IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1845

STATE OF ILLINOIS,

Petitioner,

vs.

JOHN M. VITALE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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CITATIONS

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Your Petitioner, the People of the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois which was originally entered in the instant case on April 3, 1978, and which (in compliance with an Order of the Supreme Court of the United States), has been certified by the Supreme Court of Illinois as being based upon an interpretation of a provision of the Constitution of the United States. This certification was entered by the Supreme Court of Illinois on March 22, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois holding that a petition for adjudication of wardship filed against the minor Respondent, John M. Vitale, violated Vitale's right against being twice placed in jeopardy for the same offense, was rendered by that court on April 3, 1978. It is to be found reported as *In Re Vitale, A Minor,* at 71 Ill. 2d 229, 375 N.E. 2d 87 (1978). In turn, the opinion of the Illinois Supreme Court which is the basis of the present Certiorari Petition, affirmed the result reached in the case by the Appellate Court of Illinois, First District, whose opinion is to be found reported at 44 Ill. App. 3d 1030, 357 N.E. 2d 1288 (1977). In conformity with Rule 23 of the Supreme Court of the United States, each of these opinions appears in an appendix to the present petition.

Following the rendition of the decision of the Illinois Supreme Court, the People of the State of Illinois sought review of that decision by this Honorable Court. On July 14, 1978, the People filed a Petition for Writ of Certiorari which was docketed in the United States Supreme Court as No. 78-2. On November 27, 1978, this Court entered

an order granting the Writ of Certiorari, vacating the judgment of the Supreme Court of Illinois, and remanding the case to the Supreme Court of Illinois for that court to determine whether its decision was based upon Federal or state constitutional grounds, or both. A copy of this Court's order of November 27, 1978 appears as Appendix C of the present Petition for Certiorari.

On March 22, 1979, the Supreme Court of the State of Illinois certified that its original decision was indeed based upon its interpretation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States. A copy of the notification of that certification is attached hereto as Appendix D. The case now returns to the posture wherein the decision of the Supreme Court of Illinois concerning the effect of principles of double jeopardy upon the petition filed against John Vitale should be considered and, we submit, found erroneous and overturned by the Supreme Court of the United States.

JURISDICTION OF THE COURT

The opinion of the Supreme Court of the State of Illinois affirming the earlier determination of the Appellate Court of Illinois, First District, was rendered on April 3, 1978. On March 22, 1979, pursuant to order of this Court, the Illinois Supreme Court certified that its decision was based upon Federal Constitutional grounds. The jurisdiction of the Supreme Court of the United States to hear this case on Writ of Certiorari is invoked under 28 U.S.C. § 1257(3), since in the proceedings in the State courts of Illinois the Respondent has specifically set up and argued throughout an allegation of violation of his rights arising under the Constitution of the United States. As we have noted, the Illinois Supreme Court has now certified that this

constitutional question is the basis of its decision affirming the dismissal of the delinquency petition filed against John M. Vitale.

QUESTION PRESENTED

Whether the minor Respondent who struck and killed two small children while driving his automobile through an intersection at an excessive rate of speed and in disregard of the signal of a school crossing guard, can be the subject of a petition seeking an adjudication of wardship to have him declared delinquent on the basis of these facts, notwithstanding the fact that at the scene of the collision with the two children Vitale received a traffic citation for failing to reduce speed to avoid an accident and subsequently paid a fifteen dollar fine in connection with that traffic citation; or whether, as found by the Supreme Court of Illinois, an adjudication of delinquency under these conditions would violate Vitale's right to be free from double jeopardy under the Fifth Amendment of the Constition of the United States.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V.:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation".

STATEMENT OF THE CASE

A.

General Background

On November 20, 1974, an automobile operated by John M. Vitale, then a minor, struck two five year old children. One of the children died almost instantly, the other died the following day in the hospital. According to the investigation of police at the scene, the two children were struck in a marked crosswalk while they were being assisted across the street by a uniformed school crossing guard who, at the time, was displaying a hand-held stop sign. Police investigation further indicated that at the time of the striking of the children, the automobile being driven by Vitale was traveling at approximately fifty miles per hour, althought at the time there was in effect a twenty mile per hour school speed limit. The area, at times when school was not in session, was posted with a speed limit of thirty five miles per hour. There were some seven warning signs concerning the school zone and the twenty mile per hour speed limit posted along the route which John Vitale traveled before reaching the intersection in which the young children were struck. The police also determined that three out of the four brakes on Vitale's automobile were faulty. The Respondent told a police officer at the scene that his attention was diverted to his left and that when he looked once more in the direction in which he was driving it was already too late for him to avoid striking the children. The officer at the scene issued a traffic citation charging John Vitale with failing to reduce speed to avoid an accident. Ill. Rev. Stat. 1973, Ch. 95-½, § 11-601. On December 23, 1974, the traffic case was heard in court.

Vitale entered a plea of not guilty to the charge of failing to reduce speed to avoid an accident, he was tried on that charge, and he was found guilty. A fine of fifteen dollars ($15.00) was imposed by the court.

On the following day, December 24, 1974, a petition for adjudication of wardship was filed in the Juvenile Division of the Circuit Court of Cook County, Illinois, which charged that John Vitale was a delinquent minor under applicable provisions of Illinois law. The basis of this allegation was the incident above described, the juvenile petition charging Vitale with involuntary manslaughter in connection with the deaths of the children. Vitale filed a motion to dismiss this petition alleging that in light of the fact of his having been found guilty of failing to reduce speed to avoid an accident, and his having been fined fifteen dollars, he was again being placed in jeopardy for the same offense by the petition for adjudication of wardship. The judge in the Juvenile Court found that the petition for adjudication of wardship did violate the minor's right to be free from double jeopardy and so he dismissed the petition. From this determination the People appealed under authority of Rule 604 of the Supreme Court of Illinois: Ill. Rev. Stat. 1973, Ch. 110A, § 604(a). The Appellate Court of Illinois, First District, determined that the judge below had been correct in dismissing the petition since it violated certain provisions of the Illinois Criminal Code dealing with compulsory joinder of causes in action. *In Re Vitale,* 44 Ill. App. 3d 1030, 357 N.E. 2d 1288 (1977).

The People sought and obtained Leave to Appeal to the Supreme Court of Illinois from the Appellate Court determination. With two justices strongly dissenting, the Illinois Supreme Court held on April 3, 1978, that the petition for adjudication of wardship was properly dismissed

for the reason that it violated Vitale's Fifth Amendment right to be free from being twice placed in jeopardy for the same offense. The majority of the court held that in view of the fact that Vitale had been fined for the traffic offense of failing to reduce speed to avoid an accident, he could not be charged with involuntary manslaughter in the deaths of the two five year old children. The dissenting opinion of Mr. Justice Underwood, concurred in by Mr. Justice Ryan, pointed out that these offenses were not the same in law or in fact, that the traffic charge was not a lesser included offense of the charge of involuntary manslaughter, and that there was no violation of the double jeopardy provision of the Fifth Amendment to the Constitution of the United States.

Seeking to overturn the determination of the majority of the justices of the Supreme Court of Illinois, the People sought from this Honorable Court a Writ of Certiorari. In case number 78-2, *State of Illinois* v. *John M. Vitale,* this Court granted the Writ of Certiorari on November 27, 1978. By order of the majority of justices of this Court, the judgment of the Supreme Court of Illinois was vacated and the cause remanded to that court for determination of whether its decision was based on federal or state constitutional grounds, or both. Justices Blackman and White would have granted the Writ and proceeded with the cause in the Supreme Court of the United States.

Upon remand to the Supreme Court of Illinois, that court certified on March 22, 1979, that its decision was based squarely on an interpretation of the double jeopardy provisions contained within Amendment V of the Constitution of the United States. This last determination having now been made, the People once more seek review by this Honorable Court of the determination of the Illinois Supreme Court below through the Writ of Certiorari.

B.

Facts Material To The Question Presented

Briefly stated, the facts germain to the determination of the issue herein presented are as follows.

The minor Respondent, while driving at a speed which was more than twice the posted school speed limit and in complete disregard of the signal of a school crossing guard who was directing traffic in the intersection, sped through the intersection and in the process struck and killed two small children who were attempting to cross the street under the guard's direction. Vitale was charged in a traffic citation with failure to reduce speed in order to avoid an accident, he entered a plea of not guilty, and was found guilty of the traffic charge and fined the sum of fifteen dollars ($15.00). Subsequently, a petition seeking to have Vitale declared a delinquent minor was filed charging him with involuntary manslaughter in causing the deaths of the two children. The judge in the Juvenile Division of the Circuit Court of Cook County dismissed the wardship petition pursuant to Respondent's motion, and this judgment was affirmed by the Illinois reviewing courts.

C.

Manner In Which The Federal Question Was Raised

The federal question herein presented, that of the effect upon this case of the prohibition contained in Amendment V. of the Constitution of the United States against a criminal accused being twice placed in jeopardy for the same offense, was first raised by John Vitale prior to a hearing on the charges against him by way of his motion to dismiss those charges. Throughout the processes of appeal through

the State courts of Illinois, Vitale has consistently adhered to the position that the juvenile petition violated the double jeopardy provision in light of his having previously been fined for the traffic offense of failing to reduce speed to avoid an accident. This federal constitutional question forms the complete basis for the decision of the Supreme Court of Illinois from which a Petition for the Writ of Certiorari is now sought, the Illinois Supreme Court having so certified on remand by this Honorable Court.

REASONS FOR GRANTING THE WRIT

THE DELINQUENCY PETITION CHARGING JOHN VITALE WITH INVOLUNTARY MANSLAUGHTER IN THE DEATHS OF TWO SMALL CHILDREN WAS PROPERLY FILED AGAINST HIM, NOTWITHSTANDING A PRIOR FINE IMPOSED FOR THE TRAFFIC OFFENSE OF FAILING TO REDUCE SPEED, AND DID NOT VIOLATE VITALE'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY FOR THE SAME OFFENSE, SINCE THERE WAS NOT HERE PRESENT THE NECESSARY IDENITY OF OFFENSES, AND SINCE THERE IS NO PROHIBITION IN THE LAW AGAINST ONE BEING SUBJECT TO MORE THAN ONE PROSECUTION WHEN HIS ACTIONS CONSTITUTE MORE THAN ONE OFFENSE.

As we have noted, John Vitale struck and killed two five year old children while driving his automobile through an intersection in complete disregard not only of posted school speed limits but also of a school crossing guard who stood with the children in the intersection and signaled Vitale to stop. The police officer who arrived on the scene issued a traffic ticket to Vitale charging that he

failed to reduce the speed of his vehicle to avoid an accident. Vitale was subsequently convicted of the traffic charge and a fine was imposed. Vitale, then a juvenile, was then made the subject of a petition for adjudication of wardship (a proceeding to determine his status as a delinquent minor), which was based upon the same incident. Vitale successfully moved to dismiss the delinquency petition in juvenile court on the ground that he was twice being placed in jeopardy for the same offense due to the fact that he had already been found guilty of a traffic offense and been the subject of a fine. The People appealed and, incredibly, both the Illinois Appellate Court, First District, and then the Supreme Court of the State of Illinois held that the dismissal of the delinquency petition was necessitated by the former traffic offense conviction. In particular, the majority of the Supreme Court of Illinois held that the result was mandated by the prohibition against double jeopardy contained in Amendment V of the Constitution of the United States.

In his dissenting opinion below, Mr. Justice Underwood of the Supreme Court of Illinois (with Mr. Justice Ryan concurring), states (see Appendix A):

> "I have inflicted this lengthy dissent upon the reader because I believe the majority of this court has substantially broadened the double jeopardy rule it purports to follow, reaching a result which is compelled by neither the Federal Constitution nor the constitution or statutes of Illinois." (Opinion, P. 6, Appendix A, P. A. 8)

Mr. Justice Underwood goes on to analyze the opinion of the majority and to show that it is incorrect in that there is not here present the necessary identity of the offenses to call into play the constitutional concept of double jeopardy, nor is it true (as found by the majority) that

the traffic charge of failing to reduce speed is a lesser included offense of the criminal charge of involuntary manslaughter. The People submit that in so finding Justices Underwood and Ryan were absolutely correct, that the majority opinion from which the Writ of Certiorari is herein sought is completely in error, and that this determination should not be allowed to stand since it constitutes a complete misinterpretation of the concept of prohibited former jeopardy as embodied in Amendment V of the Constitution of the United States. Furthermore, the Writ of Certoriari should be granted to correct this misinterpretation of double jeopardy since this case is not an isolated one in Illinois and, in fact, is being followed in subsequent cases by courts of review in Illinois. For these reasons this Court should grant Certiorari in the instant case and set aside the determination reached by the Supreme Court of Illinois below.

1.

Lack Of Identity Of Offenses For Purposes Of Double Jeopardy.

That under our system of justice one may not be twice placed in jeopardy for the same offense is abundently clear. Constitution of the United States, Amendment V; Constitution of the State of Illinois, Article I, § 10; *United States* v. *Jorn,* 400 U.S. 470 (1971). The Statutes of the State of Illinois further implement this policy in that they provide that a second prosecution for the same offense will not lie (Ill. Rev. Stat., 1977, Ch. 38, § 3-4), and that when offenses can and should be tried together they may not be tried separately unless the requirements of justice and due process to the accused require that they

be separately tried. Ill. Rev. Stat., 1977, Ch. 38, § 3-3. The underlying reason for the double jeopardy prohibition is to prevent the prosecution from making repeated attempts to convict an individual for the same offense and to eliminate the accompanying risk that, although he might be innocent, the individual subjected to multiple trials for the same offense might eventually be convicted. *Green* v. *United States*, 355 U.S. 184 (1955). What is sought to be prevented is multiple convictions and/or punishment for the *same offense*. *United States* v. *Wilson*, 420 U.S. 332 (1975); *North Carolina* v. *Pierce*, 395 U.S. 711 (1968). It should be further noted, since at the time of the charges here in question Vitale was a minor, that there is no question that this protection is available to those persons charged as juvenile offenders. *Breed* v. *Jones*, 421 U.S. 519 (1975). What is sought to be prevented by the double jeopardy protection can be seen in the factual situation presented by cases such as *Green* v. *United States, supra*, and *People* v. *Stickler*, 31 Ill. App. 3d 977, 334 N.E. 2d 475 (4th Dist., 1975). In the *Stickler* decision, for example, the court found it a violation of the double jeopardy concept for the defendant who had been convicted of stealing certain rings, to again be charged with and convicted of the theft of those same rings along with other property taken by him at the same time and in the same offense.

However, (and this is the point which has been completely overlooked by the majority opinion of the Illinois Supreme Court in the instant case), the double jeopardy prohibition concerns itself with the identity of the offenses and not with the identity of the act or series of acts out of which they arise. *Blockburger* v. *United States*, 284 U.S. 299 (1934); *Ciucci* v. *Illinois*, 335 U.S. 571 (1958). The same rule has many times been followed by the Supreme

Court of the State of Illinois. *People* v. *Joyner*, 50 Ill. 2d 302, 278 N.E. 2d 756 (1972); *People* v. *Hairston*, 46 Ill. 2d 348, 263 N.E. 2d 840 (1970), *cert. denied*, 402 U.S. 972 (1971). When a single act encompasses more than one offense, there is no prohibition against separate trials or convictions as to those separate offenses. *Gavieres* v. *United States*, 220 U.S. 338 (1911). See also, *People* v. *Allen*, 368 Ill. 368, 14 N.E. 2d 397 (1938), *cert. denied*, 308 U.S. 511 (1939). The test is not whether a single act or series of acts is involved. The test is that which has become commonly known as the "same evidence test". That is, the appropriate test is whether each of the charges arising out of the act or series of acts involves an element of proof which the other does not. *Brown* v. *Ohio*, 432 U.S. 161 (1977); *Jeffers* v. *United States*, 432 U.S. 137 (1977); *Blockburger* v. *United States, supra; United States* v. *Smith*, 574 F. 2d 308 (5th Cir., 1978). As this Court stated in *Lanneili* v. *United States*, 420 U.S. 770 (1975), when each offense charged requires proof different from the other, there is no violation of the right to be free from double jeopardy although there may be a substantial overlap in the elements which must be proven to constitute each charged offense. See also, *Waller* v. *Florida*, 397 U.S. 387 (1970). As Mr. Chief Justice Burger phrased it in his dissenting opinion in *Ash* v. *Swenson*, 397 U.S. 436, 463 (1969), "The concept of double jeopardy and our firm constitutional commitment is against repeated trials for *the same offense*." (Emphasis the court's).

When a single act constitutes more than one offense, when those offenses are not the same offense, double jeopardy does not prohibit separate convictions and sentences for each offense involved. *United States* v. *Wheeler*, 435 U.S. 313 (1978). So, in *Kowalski* v. *Parratt*, 533 F. 2d 1071 (8th

Cir., 1976), *cert. denied*, 429 U.S. 844 (1976), defendant was charged in the State of Nebraska under Nebraska law with robbery in that he took property from the victim by force or by putting the victim into a state of fear. He was separately charged under Nebraska law with the crime of use of a firearm in the commission of a felony. In fact, the means of putting the victim in fear in the robbery was the use of the firearm charged in the second charged offense, use of the firearm in the commission of a felony. Considering the *Blockburger* test, that is, whether the offenses are the same or whether each requires proof which the other does not, the court concluded that the two Nebraska charges did not involve the same offense because the proof required by statute for each was different than that required for proof of the other. Proof of the offense of robbery did not necessarily include the use of a firearm, nor did the elements of robbery enter into the statutory definition of use of a firearm in the commission of a felony. The test is that of what elements of proof are necessary under the applicable statute. The fact that in a particular case the proofs might be virtually the same is not a relevant consideration. This was the precise point made by Mr. Justice Underwood in his dissenting opinion in the instant case when he noted, "The crucial evidence is not that actually presented, but the evidence required by the applicable statutes". (Appendix A, p. A12). See, *Gavieres* v. *United States, supra.*

2.

Lack Of Identity Of Traffic Offense As Lesser Included Offense In Charge Of Involuntary Manslaughter.

In its opinion below, the majority of the Illinois Supreme Court held that Vitale was twice placed in jeopardy for the same offense because the traffic charge of failing to reduce speed to avoid an accident is a lesser included

offense of the charge of involuntary manslaughter. This result, as stated in the dissenting opinion of Justices Underwood and Ryan, is simply not correct. It is true that conviction of a greater offense precludes conviction of any of its lesser included offenses, or vice versa; *Brown* v. *Ohio,* 432 U.S. 161 (1977). In *Brown,* under Ohio law, the offense of joyriding was a lesser included offense of the charge of automobile theft; therefore, defendant could not be convicted of both. This Court in *Brown* specified that the issue under consideration was whether one could be convicted of both the greater and lesser included offenses under the double jeopardy concept. The fact that in *Brown* we were dealing with an instance of a lesser included offense was taken as granted by this Court in its decision. But in order to have a situation involving a lesser included offense, it is necessary that proof of the greater offense will always include proof of the lesser. *Brown* v. *Ohio, supra.* Put another way, the lesser offense requires no proof which is not necessary in order to prove the greater, and the greater offense includes among its necessitated proofs all of the elements of the lessor offense. Thus, as determined in *Brown,* a lesser included offense is the same offense as the greater for purposes of the double jeopardy concept. In the present case, the fact that the traffic offense of failing to reduce speed is not a lesser included offense of the felony charge of involuntary manslaughter can be clearly seen from the two Illinois statutes involved. Involuntary manslaughter is defined by statute in Illinois thusly (Ill. Rev. Stat. 1973, Ch. 38, § 9-3):

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great

bodily harm to some individual, and he performs them recklessly.

(b) If the acts which cause death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide."

Thus, the Illinois Legislature has made reckless homicide a lesser included offense of involuntary manslaughter. But this fact has nothing whatever to do with the case of John Vitale. It is clear that the offense of failure to reduce speed to avoid an accident is not a lesser included offense of the offense of involuntary manslaughter. The traffic charge is defined under Illinois law as follows (Ill. Rev. Stat., 1973, Ch. 95-½, § 11-601(a):

"No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions or the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care."

Speaking for himself and for Justice Ryan in his dissenting opinion in the Illinois Supreme Court below, Mr. Justice Underwood after analyzing these provisions concluded (Appendix A, p. A10):

". . . Clearly, proof that one failed to reduce the speed of his vehicle to avoid a collision (the traffic offense) does not prove manslaughter, for the traffic offense need not involve death; equally clear is the fact that commission of the crime of involuntary manslaughter (the wardship charge) need not involve an unlawful failure to reduce speed or even the use of a car."

The fact that in this particular instance death resulted among other factors from the failure of Vitale to reduce the speed of his vehicle is not relevant. Under the "same evidence test" the criterian is not that which was proven, but the elements which must be proven to meet the requirements of the several statutory provisions involved. If the so-called greater charge can be proven without including the lesser (or if the lesser includes an element not necessarily found in the so-called greater), then they are not of necessity included offenses and are not the same offenses for purposes of the Fifth Amendment. *Brown* v. *Ohio*, 432 U.S. 161 (1977); *Kowalski* v. *Parratt*, 533 F. 2d 1071 (8th Cir., 1976), *cert. denied*, 429 U.S. 844 (1976); *People* v. *Hairston*, 46 Ill. 2d 348, 263 N.E. 2d 840 (1970), *cert. denied*, 402 U.S. 972 (1971). It is clear here that failure to reduce speed need involve no death nor even collision with a pedestrian, while involuntary manslaughter need involve no automobile or element of speed at all. The offense of involuntary manslaughter by definition must involve a death, an element completely lacking from the traffic offense of failure to reduce speed. Thus, in no sense can the two offenses be said to be included within each other. They are not the same offense for purposes of double jeopardy.

The Supreme Court of Ohio in a case not unlike that now before us held that a conviction for homicide by ve-

hicle did not preclude conviction upon a traffic charge of driving at a greater speed than will permit the driver to stop within an assured clear distance. *State* v. *Best,* 42 Ohio St. 2d 530, 536, 330 N.E. 2d 421 (1975):

> "The only common element to the two offenses is that both involve the operation of a motor vehicle. No element of speed or distance ahead is involved in the offense of homicide by vehicle, and no element of causing death . . . is involved in the offense of failing to keep an assured clear distance. Although both offenses arose out of the same transaction, they are separate and distinct offenses."

Here also, the statutory elements of the two offenses are different and it is this which makes them separate and distinct offenses for double jeopardy purposes. *Virgin Islands* v. *Smith,* 558 F. 2d 691 (3rd Cir., 1977); *United States* v. *Cumberbatch,* 563 F. 2d 49 (2nd Cir. 1977). There is, as we have noted, no constitutional prohibition either in Federal or Illinois law against multiple prosecutions when an act or series of acts results in separate and distinct violations of the law. *United States* v. *Crew,* 538 F. 2d 575 (4th Cir., 1975), *cert. denied,* 429 U.S. 852 (1976); *People* v. *King,* 66 Ill. 2d 55, 362 N.E. 2d 352 (1977).

We submit, therefore, that it is clear that the traffic offense of which John Vitale was found guilty was not a lesser included offense of the charge of involuntary manslaughter, nor are the two offenses the same in law. They are not the same offense for purposes of double jeopardy. Therefore, the opinion of the majority of the Supreme Court of Illinois was incorrect and should not stand as the law in Illinois. This Court should grant Certiorari and should set aside the opinion of the Illinois Supreme Court below.

3.

Recurring Nature Of Erroneous Interpretation Of Double Jeopardy In Illinois Case Law.

In considering the instant Petition for Certiorari, the justices of this Honorable Court should be aware that the problem found in the case of John Vitale is not an isolated one in the State of Illinois. On the contrary, in similar cases Illinois courts of review have followed the interpretation of the Fifth Amendment double jeopardy provision set out in the *Vitale* decision from which this writ is now sought. In *People* v. *Zegart,* No. 51229, orally argued before the Supreme Court of Illinois on May 16, 1979, appeal was taken by the People from a determination of the Appellate Court of Illinois for the Second District. The Appellate Court (in an opinion not yet officially reported at the time of this writing), held that a woman who drove her automobile across the dividing median strip on a highway into oncoming lanes of traffic thereby causing the death of persons in another automobile could not be charged with reckless homicide. The rationale of that decision was that Marla Zegart had been issued a traffic citation for improperly crossing a highway median, and had entered a plea of guilty to the traffic offense. Like John Vitale in the instant case, Zegart had killed two persons and had received no punishment save a small fine. Relying on the *Vitale* decision from which Certiorari is herein sought, the Illinois courts have dismissed the reckless homicide case against Marla Zegart. As we have noted, at this writing, the Zegart case is pending for decision before the Supreme Court of Illinois. Thus, this problem of the misinterpretation of double jeopardy found in the instant case is already serving as precedent for errors of a similar nature in other cases in this State.

We submit that this Court should grant Certiorari, review the determination of the Illinois Supreme Court below, and determine in accordance with well established decisions of this Court that there was no violation of the Fifth Amendment double jeopardy provision in the charging of John Vitale with involuntary manslaughter.

CONCLUSION

For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

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APPENDICES

APPENDIX A

Docket No. 49326—Agenda 3—November 1977. *In re* JOHN M. VITALE, a Minor, Appellee.—(The People of the State of Illinois, Appellant.)

*MR. JUSTICE DOOLEY delivered the opinion of the court:

On November 20, 1974, an automobile operated by the minor respondent, John M. Vitale, struck two small children. One died almost immediately, and the other the following day. The investigating officer issued a traffic complaint charging respondent with failing to reduce speed to avoid an accident (Ill. Rev. Stat. 1973, ch. 95½, par. 11-601). On December 23, 1974, the traffic case was heard. Respondent pleaded guilty, was found guilty and was fined.

On the following day, December 24, 1974, a petition for adjudication of respondent's wardship was filed in the juvenile division of the circuit court of Cook County. The petition, signed by the same police officer who issued the traffic ticket, alleged respondent was delinquent in that on November 20, 1974, while recklessly driving an automobile, he committed involuntary manslaughter resulting in the death of the two minors.

Respondent subsequently moved to discharge, asserting the prosecution of the traffic charge barred the subsequent prosecution of the same offense under the compulstory joinder provision of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 3—3(b)), and the double jeopardy and due

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* This opinion was prepared by the late MR. JUSTICE DOOLEY and was adopted and filed as the opinion of the court.

process clauses of the Federal Constitution. U.S. Const., Amends. V, XIV.

The circuit court dismissed the juvenile petition. The appellate court found that the involuntary manslaughter charge and failure to reduce speed charge were predicated on the same "act" within the meaning of section 3-3(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 3—3(b)). Accordingly, it affirmed the dismissal order (44 Ill. App. 3d 1030). We granted leave to appeal under our Rule 315 (58 Ill. 2d R. 315).

Does the traffic offense for which respondent was tried and convicted, failure to reduce speed to avoid an accident, prohibit a subsequent prosecution for the manslaughter offenses? In our discussion of this broad issue we shall consider our Criminal Code of 1961 (Il.. Rev. Stat. 1973, ch. 38, par. 1—1 *et seq.*), as well as the double jeopardy clause of the Federal Constitution.

Section 3-3 of the Criminal Code of 1961 relating to joinder of offenses states:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.
>
> (c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately." (Ill. Rev. Stat. 1973, ch. 38, par. 3—3.)

So also section 3—4, having to do with the effect of a failure to comply with section 3—3, states:

> "(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, * * * if such former prosecution:
>
> (1) * * * was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3—3 of this Code (unless the court ordered a separate trial of such charge) * * *." Ill. Rev. Stat. 1973, ch. 38, par. 3—4.

The appellate court employed as a basis for its decision the definitions of "act" and "conduct" in the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, pars. 2—2, 2—4). An "act" includes "a failure or omission to take action," and "conduct" is "an act or a series of acts, and the accompanying mental state." The appellate court concluded the acts in both the offense of failure to reduce speed and the offense of involuntary manslaughter were identical, with the exception that in the manslaughter offense a death was involved. Both offenses, it continued, were within the jurisdiction of a single court, the juvenile division of the circuit court of Cook County (Ill. Rev. Stat. 1973, ch. 37, par. 702—2).

The appellate court was likewise of the opinion that the State's Attorney's office had knowledge of the deaths when the traffic charge was prosecuted. Thus all the requirements of section 3—3(b) were met so as to bar subsequent prosecution.

We believe there is a more compelling reason why respondent cannot be prosecuted for the offense of involuntary manslaughter. The fifth amendment to the Constitution of the United States provides:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amend. V.)

The fifth amendment applies to the States through the due process clause of the fourteenth amendment. *Benton* v. *Maryland* (1969), 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056.

It is well established that certain constitutional protections are available to juveniles. (*In re Winship* (1970) 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068; *In re Gault* (1967), 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428.) Prosecuting a minor in special juvenile adjudicatory proceedings places him in jeopardy within the meaning of the fifth amendment. *Breed* v. *Jones* (1975), 421 U.S. 519, 44 L. Ed. 2d 346, 95 S. Ct. 1779.

The common law has long recognized double jeopardy. In referring to prior acquittal and prior conviction, Blackstone observed that this principle "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." 4 W. Blackstone, Commentaries *335. See also 3 E. Coke, Institutes 212-13 (1797); J. Sigler, Double Jeopardy: The Development of a Legal & Social Policy 2-16 (1969).

In determining whether multiple actions are prosecution for the same offense, the inquiry has historically been whether the same evidence will sustain the proof of each offense. *Gavieres* v. *United States* (1911), 220 U.S. 338, 342, 55 L. Ed. 489, 490, 31 S. Ct. 421, 422.

In the recent case of *Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221, prosecution and punishment for joyriding—taking an automobile without the owner's permission—prohibited prosecution and punishment for automobile theft, an offense which required proof of intent on the part of the thief to permanently deprive the owner of possession. We are told:

> "The Double Jeopardy Clause of the Fifth Amendment, applicable to States through the Fourteenth, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. *It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition.* 1 J. Bishop, New Criminal Law sec. 1051 (8th ed. 1892); Comment, Twice in Jeopardy, 75 Yale L. J. 262, 268-269 (1965). The principal question in this case is whether auto theft and joyriding, a greater and lesser included offense under Ohio law, constitute the 'same offense' under the Double Jeopardy Clause." (Emphasis added.) 432 U.S. 161, 164, 53 L. Ed. 2d 187, 193, 97 S. Ct. 2221, 2224-25.

So here the two separate statutory offenses of failing to reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the "same" within the double jeopardy clause.

Any lesser offense is included in the greater offense for the purpose of double jeopardy. This was pronounced as long ago as 1889 in *In re Nielsen* (1989), 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672, where it was observed:

> "[W]here * * * a person has been tried and convicted for a crime which has various incident included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." 131 U.S. 176, 188, 33 L. Ed. 118, 122, 9 S. Ct. 672, 676.

Brown v. *Ohio* (1977), 432 U.S. 161, 53, L. Ed. 2d 187, 97 S. Ct. 2221, exemplifies the meaning of the test to determine whether the two offenses are the same. Joyriding was a lesser included offense in automobile theft. The State, to prove theft, had to establish joyriding plus the

requisite intent of the thief to permanently deprive the owner of possession. Nevertheless, the prior prosecution for joyriding barred prosecution for automobile theft.

Here it becomes important to examine the statutory definition of the crimes of involuntary manslaughter and failure to reduce speed.

Involuntary manslaughter was defined by statute at the time of the occurrence thus:

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
>
> (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.
>
> (c) Sentence.
>
> (1) Involuntary manslaughter is a Class 3 felony.
>
> (2) Reckless homicide is a Class 4 felony." Ill. Rev. Stat. 1973, ch. 38, par. 9—3.

The issues in reckless homicide are: Did the defendant cause death by driving a motor vehicle? Did the defendant drive the motor vehicle recklessly? Did the defendant drive the motor vehicle in a manner likely to cause a death or great bodily harm? Each of these has to be proved beyond a reasonable doubt. Illinois Pattern Jury Instructions, Criminal, No. 7.10 (1968).

Failure to reduce speed to avoid an accident is defined by statute as follows:

> "(a) No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. *Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*" (Emphasis added.) Ill. Rev. Stat. 1973, ch. 95-½, par. 11—601(a).

The statute imposes the duty upon all motorists to exercise ordinary care, to reduce speed, and to avoid colliding with "any person."

To prove the charge of failing to reduce speed, the State has to prove that the defendant drove carelessly and failed to reduce speed to avoid colliding with a person. Involuntary manslaughter with a motor vehicle, or reckless homicide, is a reckless operation of a motor vehicle in a manner likely to cause death or great bodily harm (Ill. Rev. Stat. 1973, ch. 38, par. 9—3). "Recklessness" does not require an intent to kill. (See *People* v. *Parr* (1976), 35 Ill. App. 3d 539, 542; *People* v. *Bembroy* (1972), 4 Ill. App. 3d 522, 525.) It is a species of violation of duty. Ill. Rev. Statfl 1973, ch. 38, par. 4—6; *People* v. *Potter* (1955), 5 Ill. 2d 365, 368.

As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for

conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the "same" as the lesser offense included within it.

Failing to reduce speed and involuntary manslaughter cannot be fragmented so as to create different offenses. "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown* v. *Ohio* (1977), 432 U.S. 161, 169, 53 L. Ed. 2d 187, 196, 97 S. Ct. 2221, 2227.

The sequence of the prosecution is immaterial. The conviction of the lesser precludes conviction of the greater, just as conviction of the greater precludes conviction of the lesser. (*Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221; *In re Nielsen* (1889), 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672.) Here it is irrelevant of what offense, failing to reduce speed or involuntary manslaughter, respondent was first convicted.

Both offenses were against the same sovereign, the State of Illinois. The traffic court, as well as the juvenile court, were courts of this same sovereign. (See *Waller* v. *Florida* (1970), 397 U.S. 387, 25 L. Ed. 2d 435, 90 S. Ct. 1184; *People* v. *Gray* (1977), 69 Ill. 2d 44.) The trial and conviction in the traffic court barred subsequent action in the juvenile court of Cook County. The State could not place respondent on trial twice for the "same offense."

Double jeopardy is a constitutional guarantee. It is a matter which cannot be left for State court determination. (*Ashe* v. *Swenson* (1970), 397U.S.436, 442-43, 25 L. Ed. 2d 469, 475. 90 S. Ct. 1189, 1194.) State legislatures are free to define crimes and fix punishments. Once the legislature has acted, however, the courts are prohibited by the

due process and double jeopardy clauses from imposing more than one punishment for the same offense. *Brown* v. *Ohio* (1977), 432 U.S. 161, 165, L. Ed. 2d 187, 193, 97 S. Ct. 2221, 2225.

For reasons herein expressed, under the double jeopardy clause the conviction on the traffic charge of failure to reduce speed precluded the prosecution in a separate action for involuntary manslaughter.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, dissenting:

I have inflected this lengthy dissent upon the reader because I believe the majority of this court has substantially broadened the double jeopardy rule it purports to follow, reaching a result which is compelled by neither the Federal Constitution nor the constitution or statutes of Illinois.

Brown v. *Ohio* (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221, relied on by the majority, does not require the dismissal of the involuntary manslaughter charge levied against Vitale. In *Brown,* the defendant was first convicted of joyriding and later convicted of auto theft. The Ohio court conceded that, under the applicable Ohio statute, joyriding was completely included within the offense of auto theft. On that basis the Supreme Court reversed the subsequent conviction, holding that an included offense is the same offense for the purpose of applying the protection of the double jeopardy clause. That holding is inapplicable here because under the lesser included offense test also found in the *Brown* opinion, the offense of failing to reduce speed to avoid an accident is not encompassed by the offense of involuntary manslaughter.

This court recently considered whether subsequent prosecutions for aggravated battery and attempted murder were

constitutionally impermissible where there had been a prior finding and punishment for indirect contempt of court based upon the identical conduct. In *People* v. *Gray* (1977), 69 Ill. 2d 44, with the author of this opinion specially concurring and Mr. Justice Ryan dissenting, the court held the subsequent prosecutions precluded. We there said, "To determine whether two actions are prosecutions for the same offense, the test is: Would the same evidence sustain the proof of each offense?" In a similar vein we quoted from the opinion of the Supreme Court in *Brown* v. *Ohio* (1977), 432 U.S. 161, 166, 53 L. Ed. 2d 187, 194, 97 S. Ct. 2221, 2225.

> "Mr. Justice Powell, speaking for the court in holding that prosecution and punishment for auto theft prohibited prosecution and punishment for joyriding, had occasion to restate the controlling principles which bar successive prosecutions as well as consecutive sentences at a single trial:
>
> 'The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States,* 284 U.S.299, 304 (1932):
>
> "The applicable rule is that where the same act of transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. * * *"'
>
> This test emphasizes the elements of the two crimes. "If each requires proof that the other does not, the *Blockburger* test would be satisfied, notwithstanding a substantial overlay in the proof offered to establish the crimes.' * * *" *Iannelli* v. *United States,* 420 U.S. 770, 785 n.17 (1975).
>
> * * *" [Citation.]" 69 Ill. 2d 44, 49-50.

It was also noted that *Brown* held "conviction of a lesser included offense barred prosecution for a greater offense, * * * since the lesser offense required no proof beyond that required for the conviction of the greater offense." (69 Ill. 2d 44, 51.) It is precisely the fact that each of the charges here "requires proof of a fact which the other does not," and that proof of the greater offense does not necessarily involve proof of the lesser, which distinguishes this case from *Brown* and *Gray*. Clearly, proof that one failed to reduce the speed of his vehicle to avoid a collision (the traffic offense) does not prove manslaughter, for the traffic offense need not involve death; equally clear is the fact that commission of the crime of involuntary manslaughter (the wardship charge) need not involve an unlawful failure to reduce speed or even the use of a car. In short the traffic violation was not a lesser included offense of the manslaughter charges upon which the wardship proceedings are predicated, and therefore the latter do not fall within the admonition of *Brown* that "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." (432 U.S. 161, 169, 53 L. Ed. 2d 187, 196, 97 S. Ct. 2221, 2227.) The majority's conclusion that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter" (slip op. at 5) is, of course, simply not correct, for, as above stated, proof of manslaughter need not involve a car at all.

Under the "same evidence" test, the fact that similar evidence is in fact introduced in both trials is irrelevant. If the greater offense can be accomplished without committing the lesser offense, then the greater offense does not embrace the lesser, notwithstanding that in the particular

case the same facts give rise to both offenses. "As is *invariably* true of a greater and lesser included offense, the lesser offense * * * requires no proof beyond that which is required for conviction of the greater * * *." (Emphasis added.) (*Brown* v. *Ohio* (1977), 432 U.S. 161, 168, 53 L. Ed. 2d 187, 195-196, 97 S. Ct. 2221, 2226.) The crucial evidence is not that actually presented, but the evidence required by the applicable statutes. Our opinions make plain that Illinois has heretofore been among the majority of jurisdictions applying this test in determining what are included offense. In *People* v. *Hairston* (1970) 46 Ill. 2d 348, 358, this court quoted *Gavieres* v. *United States* (1911), 220 U.S. 338, 342, 55 L. Ed. 489, 490, 31 S. Ct. 421, 422, also relied upon in *Gray,* as follows:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same *act,* but whether he has been put in jeopardy for the same *offense.* A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis added.)

This court went on to note:

> "Along the same lines, it has been frequently manifested that offenses are not the same if, upon trial of one, proof of an additional fact is required which is not necessary to be proved in the trial of the other, although the same acts may be necessary to be proved in the trial of each. *Ebeling* v. *Morgan* (1915), 237 U.S. 625, 59 L. Ed. 1151, 35 S. Ct. 710; *Blockburger* v. *United States* (1932), 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180; *Gore* v. *United States* (1958), 357 U.S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280; *Hattaway* v. *United States* (5th Cir. 1968), 399 F. 2d 431; *People* v. *Garman,* 411 Ill. 279." (46 Ill. 2d 348, 358-59.)

In *People* v. *Glickman* (1941), 377 Ill. 360, defendant was charged with burglary under the applicable statute, which did not contain the common law requirement of entering at night. Defendant was convicted of attempted burglary under a statute which did require that the attempt be made at night. In support of this conviction, the State argued that attempt was a lesser offense included within burglary, but this court reversed the conviction holding that "the greater crime, burglary, does not contain all of the elements of the lesser, for the element 'in the nighttime' is absent" (377 Ill. 360, 367), although defendant's activity was in fact shown to be at night. See also *People* v. *King* (1966), 34 Ill. 2d 199; *People* v. *Higgins* (1967); 86 Ill. App. 2d 202; *People* v. *Shoemaker* (1975), 31 Ill. App. 3d 724.

Following *Glickman,* the legislature defined an included offense in section 2—9 of the Criminal Code:

> "Included offense" means an offense which
>
> (a) Is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or
>
> (b) Consists of an attempt to commit the offense charged or an offense included therein." (Ill. Rev. Stat. 1975, ch. 38, par. 2—9.)

It thereby incorporated the "same evidence" test (see *People* v. *Baylor* (1975), 25 Ill. App. 3d 1070, 1074), which is applied although the facts presented in the particular case actually prove the lesser offense. See *People* v. *Yanders* (1975), 32 Ill. App. 3d 599.

The essence of the "same evidence" or "required evidence" test of *Blockburger* v. *United States* (1932), 284 U.S. 299, 304, 76 L. Ed. 306, 309, 52 S. Ct. 180, 183 is "whether each provision requires proof of an additional fact which the other does not." This test, utilized by a majority of American jurisdictions, has been restated by various American courts. In Comment, *Twice in Jeopardy,* 75 Yale L.J. 262 (1965), the author noted these reformulations of the test: (1) the "backwards" test—offenses are not the same unless defendant could have been convicted of the second offense on the evidence needed in the first trial; (2) the "distinct elements" test—"offenses are not the same if each contains an element not included in the other"; (3) the "identity" test—"offenses are the same for double jeopardy purposes only if they are identical in law and fact." (75 Yale L.J. 262, 273.) The Supreme Court of Iowa, in holding that a reckless driving conviction did not bar a subsequent prosecution for manslaughter, stated: "The lesser offense must be composed solely of some but not all elements of the greater crime. The lesser crime must not require any additional element which is not needed to constitute the greater crime. The lesser offense is therefore said to be *necessarily* included within the greater." (*State* v. *Stewart* (Iowa 1974), 223 N.W. 2d 250, 252, *cert. denied* (1975), 423 U.S. 902, 46 L. Ed. 2d 134, 96 S. Ct. 205.)

The Supreme Court of Ohio in *State* v. *Best* (1975), 42 Ohio St. 2d 530, 330 N.E. 2d 421, a case very similar to our own, held that the charge of driving a vehicle "at a greater speed than will permit him [the driver] to bring it to a stop within the assured-clear-distance" (42 Ohio St. 2d 530, 536, 330 N.E. 2d 421, 425) is not barred by a prior prosecution for homicide by vehicle because it is not a lesser

included offense. The court found that the misdemeanor bore no relationship to the offense of homicide by vehicle, stating:

> "The only common element to the two offenses is that both involve the operation of a motor vehicle. No element of speed or distance ahead is involved in the offense of homicide by vehicle, and no element of causing death or of violation of the specific statutes cited in [the homicide statute] is involved in the offense of failing to keep an assured-clear-distance ahead. Although both offenses arose out of the same transaction, they are separate and distinct offenses." 42 Ohio St. 2d 530, 536, 330 N.E. 2d 421, 425.

In the recent, post-*Brown* case of *Virgin Islands* v. *Smith* (3d Cir. 1977), 558 F. 2d 691, the court of appeals acknowledged that *Brown* followed the *Blockburger* rule, which says that it is the evidence demanded by the definition of the offense, not the evidence adduced at trial, which determines the inclusion of one offense within another. In *Smith,* the defendant asserted that a prior conviction of possession of a dangerous weapon barred prosecution for a murder committed with that weapon. The court disagreed, stating:

> "The Supreme Court made its position clear in *Iannelli* v. *United States,* 420 U.S. 770, 785 n. 17, 95 S. Ct. 1284, 1294, 43 L. Ed. 2d 616 (1975), where it said:
>
> > '[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'
>
> See also *Brown* v. *Ohio,* supra.
>
> Viewing the criminal activity here against that backdrop reveals the weakness of defendant's position. Al-

> though a dangerous weapon may be used to commit a murder, a victim can be killed without the use of any weapon, for example, by strangulation. Moreover, it would be possible for a person to possess a knife in violation of the weapons statute, but in stabbing a person in self-defense be innocent of murder. Thus, a verdict of guilty on either charge would not establish the legal prerequisites for the other." 558 F. 2d 691, 696.

Similarly, in *United States* v. *Cumberbatch* (2d Cir. 1977), 563 F. 2d 49, the court cited *Brown* in holding that the offense of carrying a firearm unlawfully during the commission of a felony is not included in the offense of bank robbery with the use of a dangerous weapon, and that conspiracy to commit bank robbery is not included in the offense of bank robbery. For other cases holding this weapons offense not included in armed robbery see *Coates* v. *Maryland* (1977), 436 F. Supp. 226, also citing *Brown*, and *United States* v. *Crew* (4th Cir. 1976), 538 F. 2d 575, *cert. denied* (1976), 429 U. S. 852, 50 L. Ed. 2d 127, 97 S. Ct. 144.

Brown's reiteration of the "same evidence" test of *Blockburger* evinces once again the Supreme Court's consistent refusal to adopt the continuing arguments of some of its members for "episodic immunity" or a "same transaction" test which would generally require the joinder in one proceeding of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." (*Ashe* v. *Swenson* (1970), 397 U.S. 436, 453-54, 25 L. Ed. 2d 469, 481, 90 S. Ct. 1189, 1199; *Brown* v. *Ohio* (1977), 432 U.S. 161, 170, 53 L. Ed. 2d 187, 197, 97 S. Ct. 2221, (Brennan & Marshall, J.J., concurring).) (See collection of dissents cited in *Thompson* v. *Oklahoma* (1977), 429 U.S. 1053, 1054, 50 L. Ed. 2d 770, 97 S. Ct. 768

(Brennan & Marshall, J.J., dissenting from denial of *certiorari*).) Nor, until now, has this court construed our constitution or statutes as incorporating a "same transaction" test. *People* v. *Hairston* (1970), 46 Ill. 2d 348, 358; *People* v. *Allen* (1937), 368 Ill. 368, 379.

Directly in point is our recent clarification in *People* v. *King* (1977), 66 Ill. 2d 551, of the confusion resulting from earlier opinions considering the multiple prosecution and sentencing questions. We there undertook a comprehensive discussion of the constitutional and statutory issues involved, concluding:

> "[W]e are aware of no constitutional limitations against multiple convictions and concurrent sentences for different offenses arising from multiple acts which are incidental to or motivated by some greater criminal objective. Multiple convictions and *consecutive* sentences have been permitted against claims of double jeopardy for offenses based on a single act but requiring proof of different facts. *Gore* v. *United States* (1958), 357 U.S. 386, 2 L. Ed. 2d 1405, 78 S. Ct. 1280; *Blockburger* v. *United States* (1932), 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180." (66 Ill. 2d 551, 565.)

Even more precisely in point, perhaps, is the following:

> "Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. "Act," when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." 66 Ill. 2d 551, 566.

The lesser included offense doctrine evolved at common law as an aid to the prosecution when it failed to prove all the elements necessary for a guilty verdict on the crime charged in the indictment. (*People* v. *Mussenden* (1955), 308 N.Y. 558, 56, 127 N.E. 2d 551, 553; *United States* v. *Harary* (2d Cir. 1972), 457 F. 2d 471, 478.) A strict adherence to the "same evidence" standard protects defendants from too broad an application of this doctrine and a resultant conviction of an offense not charged. (*People* v. *Glickman* (1941), 377 Ill. 360; *People* v. *Rainbolt* (1977), 52 Ill. App. 3d 374 (criminal trespass to vehicle not a lesser offense included in charge of theft of a vehicle, conviction of criminal trespass to vehicle on theft indictment reversed); *People* v. *Yanders* (1975), 32 Ill. App. 3d 599 (theft not less offense included in robbery, theft conviction on basis of robbery indictment reversed); *People* v. *Shoemaker* (1975), 31 Ill. App. 3d 724 (burglary indictment will not support theft conviction since proof of burglary need not include all essential elements of theft); *People* v. *Higgins* (1967), 86 Ill. App. 2d 202 (aggravated battery not included within involuntary manslaughter, conviction of aggravated battery on involuntary manslaughter charge reversed).) In my opinion, a charge of involuntary manslaughter, as here, would not support a conviction for failing to reduce speed. In its desire to protect this defendant, the majority has eroded the important protections offered other defendants by the "same evidence" doctrine.

Nor do the compulsory joinder provisions of the Criminal Code relied on by the appellate court apply to the charges made against Vitale. It is clear that section 3—3(b) requires joinder of the traffic charge and the manslaughter charge if both arose from the "same act," and that in such circumstances section 3—4(b)(1) would effectively bar a

separate prosecution of the manslaughter charges subsequent to conviction on the traffic charge unless separate trials had been ordered by the trial court pursuant to section 3—3(c). If, however, the charges are not used on the same act, they need not be joined in a single prosecution, and conviction of the traffic violation does not preclude subsequent prosecution of the manslaughter charges. See Ill. Ann. Stat., ch. 38, par. 3—3, Committee Comments, at 202 (Smith-Hurd 1972).

The appellate court found that the involuntary manslaughter charge and the charge of failure to reduce speed to avoid an accident were both based on the "act" of driving a motor vehicle in a manner likely to cause a collision, with such act resulting in collision. The specific act for which Vitale was convicted in traffic court was his failure to decrease his speed to avoid colliding with the pedestrians. (Ill. Rev. Stat. 1973, ch. 95½, par. 11—601(a).) In some circumstances such an act may also be sufficient, should there be a resultant death, to support an involuntary manslaughter or reckless homicide prosecution, since this act may have been performed recklessly and was "likely to cause death or great bodily harm to some individual." (Ill. Rev. Stat. 1973, ch. 38, par. 9—3(a).) However, there is no showing here that the manslaughter rests solely or even principally upon the failure to reduce speed.

The police report of the accident, contained in the record before us, states that Vitale struck and killed two 5-year-old children who were crossing the street in a marked school crosswalk under the direction of a uniformed crossing guard displaying a stop sign in the center of the street. According to the report, Vitale stated that his attention was diverted to his left and when he looked back it was too late to stop. The investigating officer was of the opinion

the the skid marks indicated that defendant was traveling at a speed in excess of 50 miles per hour. The accident occurred in a zone normally limited to 35 miles per hour, but in which a 20 miles per hour school speed limit was in effect. The police report states that there were seven official speed warning signs within 1¾ blocks of the crosswalk. In addition, the report indicates that three of the vehicle's four brakes tested out as faulty.

The petition for wardship may have been based on Vitale's acts in permitting his attention to be diverted while driving at a high rate of speed, failing to appropriately maintain the vehicle's braking system, failing to note the seven school zone and speed warning signs, initially raising the speed of his auto to a dangerous level, or by disobeying the commands of the crossing guard. While we do not now know which of that series of acts the State intended to rely on at trial, one certainly cannot now say that it would rely solely upon Vitale's failure to reduce speed to the exclusion of his other misconduct.

In *People* v. *Griffin* (1967), 36 Ill. 2d 430, the State charged defendant with reckless driving, but the court found the information which the State filed in that case so imprecise that the defendant would not be able to plead a judgment thereon as a bar to a future prosecution arising from the same facts. The particular act or acts which constituted reckless driving may have been any one of a number acts, such as "driving while intoxicated, or running through a stop-light, or driving at an excessive speed or without brakes, lights or horn; he may have been driving on the wrong side of the road or on the sidewalk, or without keeping proper lookout for children, or any one of dozens of things which might constitute willful and wanton disregard for the safety of persons or property." 36 Ill. 2d 430, 432, citing *People* v. *Green* (1938), 368 Ill. 242, 254-44. The

importance of *Griffin* here is the court's discussion of the statutory compulsory joinder protections:

> "It does not appear that the compulsory joinder provision of the Criminal Code (Ill. Rev. Stat. 1965, chap. 38, par. 3—3,) would protect him against subsequent prosecution for each of the specific [traffic] offenses. Section 3—3 requires that offenses be prosecuted together only 'if they are based on the same act.' The comments of the drafting committee make it clear that this provision was not meant to require joinder of separate offenses resulting from the same 'conduct' (Committee Comment, S.H.A. chap. 38, par. 3—3,) which is defined as 'an act or a series of acts.' (Ill. Rev. Stat. 1965, chap. 38, par. 2—4.) Since each act in the example stated would be a separate offense, and might, in appropriate circumstances, constitute reckless driving, the compulstory joinder provision would not prevent successive prosecutions for reckless driving and for each of the other violations." 36 Ill. 2d 430, 433-34.

The committee comments to this section state that "Section 3—3 is not intended to cover the situation in which several offenses—either repeated violations of the same statutory provision or violations of different provisions—arise from a series of acts which are closely related with respect to the offender's single purpose or plan." (Ill. Ann. Stat., ch. 38, par. 3—3, Committee Comments, at 202 (Smith-Hurd 1972).) Of course, involuntary manslaughter is a "nonintent" offense, and the minor here had no "purpose or plan," but his conduct did involve multiple offenses—violations of different statutes arising from a series of acts contributing to the result with which he is now being charged.

It is clear that section 3—3 cannot be applied to bar the wardship proceedings here, where the State may seek to prove the homicide allegations by showing any or all of a

number of different acts by respondent to be reckless and like to cause death or great bodily harm.

By its opinion the majority has adopted, *sub silentio,* the "episodic immunity" or "same transaction" test unsuccessfully urged by the minority in the United States Supreme Court in *Ashe* and *Brown,* and rejected by both this court and our General Assembly, as earlier noted. In accomplishing this result both the Federal constitution and Federal case law are misinterpreted. If my colleagues feel compelled to expand the protections of the double jeopardy clause, I would have thought it preferable to do so by enlarging the prior interpretations of article 1, section 10, of our own constitution instead of misapplying Federal constitutional provisions. By choosing the latter course the majority has muddied what have been reasonably clear waters.

While I find no bar to prosecution of this wardship proceeding. I would call attention to the sentiments in *United States* v. *Wilson* (1975), 420 U.S. 332, 343, 43 L. 1d. 2d 232, 241, 95 S. Ct. 1013, 1021. Generally speaking, considerations of fairness and finality, as well as judicial efficiency and economy, would seem to indicate the undesirability, even though permissible, of successive prosecutions for offenses arising from the same "episode" or "transaction." This philosophy might well guide the exercise of prosecutorial discretion, but the difficulty of an absolute rule is amply demonstrated by the majority holding here which permits a defendant who has caused two deaths to escape punishment other than a nominal fine.

I would reverse the judgments of the appellate and circuit courts and remand to the circuit court of Cook County for further proceedings.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX B

No. 62870

IN THE INTEREST OF: JOHN M. VITALE, a minor. PEOPLE OF THE STATE OF ILLINOIS, *Petitioner-Appellant,* vs. JOHN M. VITALE, a minor, *Respondent-Appellee.*	Appeal from the Circuit Court of Cook County, Juvenile Division. Honorable Joseph C. Mooney, Judge Presiding.

MR. JUSTICE McGLOON delivered the opinion of the court:

Respondent, John Vitale, was charged, tried and convicted by the circuit court of Cook County, in South Holland, Illinois, of the offense of failing to reduce speed to avoid an accident, in violation of section 11-601 of the Illinois Vehicle Code. (Ill. Rev. Stat. 1973, ch. 95½, par. 11-601.) Subsequently, a petition for adjudication of respondent's wardship was filed in the juvenile division of the circuit court of Cook County, alleging that respondent was delinquent because he committed involuntary manslaughter arising from his reckless misconduct in the operation of a motor vehicle which resulted in the deaths of two children. Respondent moved for discharge of the juvenile petition, arguing that the latter prosecution was barred by both the constitutional rules against double jeopardy and the statutory provisions contained in section 3-4 of the Criminal Code. (Ill. Rev. Stat. 1973, ch. 38, par. 3-4.)

The circuit court dismissed the juvenile petition, and the State appeals.

We affirm.

The pleadings disclose the following pertinent facts. On November 20, 1974, the car respondent was operating struck two small children; one child died almost immediately and the other died the next day. The investigating officer of the South Holland Police Department issued a traffic complaint and summons to respondent, charging him with failing to reduce speed to avoid an accident. (Ill. Rev. Stat. 1973, ch. 95½, par. 11-601.) The traffic case was heard at a bench trial on December 23, 1974. Vitale pleaded not guilty, was found guilty, and a fine was assessed against him. The records from the traffic case, unfortunately, are not before us. On the next day, December 24, 1974, a petition for the adjudication of John Vitale's wardship was filed in the juvenile division of the circuit court of Cook County. The petition alleged that respondent was delinquent because he committed two offenses of involuntary manslaughter on November 20 while recklessly driving a motor vehicle. The petition was signed by the same policeman who initiated the traffic proceeding. Respondent subsequently moved for discharge of the juvenile petition because he had already been tried for an offense arising from the November 20 incident, so that the latter prosecution was barred by sections 3-3 and 3-4 of the Criminal Code. Ill. Rev. Stat. 1973, ch. 38, pars. 3-3 and 3-4.

Section 3-3 of the Criminal Code states:

"(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately."

Section 3-4 provides the effect of a failure to comply with section 3-3:

"* * * (b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, * * * if such former prosecution:

(1) * * * was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code (unless the court ordered a separate trial of such charge) * * *."

Ill. Rev. Stat. 1973, ch. 38, pars. 3-3 and 3-4.

This appeal presents three questions under section 3-3: (1) Whether the offense of failing to reduce speed to avoid an accident was based on the same act as the offenses of involuntary manslaughter; (2) Whether the traffic offense and the involuntary manslaughter offenses were within the jurisdiction of a single court; and (3) Whether the involuntary manslaughter offenses were known to the proper prosecuting officer when the traffic charge was prosecuted.

The first issue is whether the traffic offense for which respondent was convicted in traffic court, failing to reduce speed to avoid an accident (hereinafter FTRS), arose from the same act as the involuntary manslaughter offenses. The State argues that the offenses of FTRS is not a lesser included offense of involuntary manslaughter, and that the offenses are separate and distinct in law and fact. The

respondent argues that the traffic offense is a lesser included offense of involuntary manslaughter, and all the offenses arose from and are based on the same act.

The offense of involuntary manslaughter is defined as follows:

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
>
> (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide.
>
> (c) Sentence.
>
> (1) Involuntary manslaughter is a Class 3 felony.
>
> (2) Reckless homicide is a Class 4 felony."

(Ill. Rev. Stat. 1973, ch. 38, par. 9-3.) Under the statute in effect at the time of the conduct in question, reckless homicide was a lesser included offense of involuntary manslaughter. (*People* v. *Gibson* (1976), — Ill. App. 3d —, 354 N.E. 2d 71.) Because reckless homicide and FTRS have the same common denominator, the use of a motor vehicle, we shall compare these offenses to determine whether FTRS and reckless homicide, and therefore involuntary manslaughter, are based upon the same act.

The elements of reckless homicide are: (1) that the defendant caused the victim's death by driving a motor vehicle; (2) that the defendant drove the motor vehicle recklessly; and (3) that the defendant drove the motor vehicle in a manner likely to cause death or great bodily

harm. (Illinois Pattern Jury Instructions, Criminal, No. 7.10) Although not stated in as many words, a collision with a person or property is an element of proof because the death in such a case would always result from such a collision. As was stated in *People* v. *Crego* (1946), 395 Ill. 451, 461-62:

> "Before a verdict of guilty in an automobile manslaughter case can be sustained the proof must disclose that defendant knew of the danger of collision and reckless, * * * ran down and collided with the deceased without using such means as were reasonable and at his command to prevent the accident."

The offense of failing to reduce speed to avoid an accident is set forth in section 11-601(a) of the Illinois Vehicle Code:

> "(a) No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. *Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*"

(Ill. Rev. Stat. 1973, ch. 95½, par. 11-601(a), emphasis added.) The first element is that the defendant, while driving a motor vehicle, collided with a person or vehicle. The second element of the offense as written is that the de-

fendant drove the motor vehicle in a manner which was in violation of his duty to exercise due care. The final element is that the collision was caused by defendant's failure to reduce his vehicle's speed in violation of his duty to due care. The penalty provision is that the first and second convictions for this offense are Class C misdemeanors (Ill. Rev. Stat. 1973, ch. 95½, par. 16-104), punishable by not more than 30 days imprisonment (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-3(3)), and a fine not to exceed $500. Ill. Rev. Stat. 1973, ch. 38, par. 1005-9-1(3).

The State argues that the respondent's act of FTRS causing a collision with two persons was independent of and had no necessary or consequential relationship with the acts which would constitute respondent's culpability of the offense of involuntary manslaughter. We believe that the appropriate law is contained within our Criminal Code, which defines "act" to include "a failure or omission to take action," and defines "conduct" as "an act or a series of acts and the accompanying mental state." (Ill. Rev. Stat. 1973, ch. 38, pars. 2-2 and 2-4.) As applied to the instant facts, these definitions lead us to the following conclusions. The *conduct* constituting the offense of involuntary manslaughter with a motor vehicle, or reckless homicide, is the *act* of driving a motor vehicle in a manner likely to cause a collision resulting in death, with the resulting collision and death, accompanied by the mental state of recklessness. The act constituting the offense of FTRS is the *act* of driving a motor vehicle and *failing* to reduce its speed to avoid a collision, with such failure resulting in a collision. Since an act includes a failure or omission, the offense of FTRS is the *act* of driving a motor vehicle in a manner likely to cause a collision, with such act resulting in a collision. Comparing the acts in both

offenses, the major difference is in the death required for involuntary manslaughter. The basic acts of both offenses are identical. We hold that the attempted prosecution herein for the two offenses of involuntary manslaughter was based upon the same act as the former prosecution for the offense of failing to reduce speed.

The second issue arising under section 3-3 is whether the traffic offense of FTRS and the involuntary manslaughter offenses were within the jurisdiction of a single court. The Juvenile court has original and exclusive jurisdiction over a minor who is delinquent by reason of the violation of "any federal or state law or municipal ordinance" (Ill. Rev. Stat. 1973, ch. 37, par. 702-2; *In re Rahn* (1974), 59 Ill. 2d 302, 319 N.E. 2d 787), except that a minor alleged to have committed a traffic offense may be prosecuted therefor without reference to the procedures of the Juvenile Court Act (Ill. Rev. Stat. 1973, ch. 37, par. 702-7(2).) In the case at bar, jurisdiction over the minor for commission of the traffic offense of FTRS was properly exercised by the circuit court sitting in South Holland without regard for the requirements of the Juvenile Court Act, although the juvenile court also had jurisdiction over the minor for the same offense. The offenses of FTRS and involuntary manslaughter were all within the jurisdiction of a single court, the juvenile division of the circuit court of Cook County.

The third issue is whether the involuntary manslaughter offenses were known to the proper prosecuting officer when the traffic charge was prosecuted. At the June 9, 1975 hearing on respondent's motion, the trial court specifically asked the two assistant State's Attorneys in court whether the manslaughter charges were known to the State's Attorney's office when the traffic offense was heard on December 23,

1974. In response to this question, one prosecutor said that she should not supply the requested information at that moment. The record is silent as to whether a prosecutor was in attendance at the December 23 trial. Furthermore, the prosecution does not deny being in attendance and having knowledge of the manslaughter offenses. We would note that the respondent first claimed his rights under sections 3-3 and 3-4 on February 27, 1975 (Ill. Rev. Stat. 1973, ch. 37, par. 701-2(3) (a)), and that the State filed two responses, on April 4 and May 5. Neither response denied such attendance and knowledge.

The State argues that although the investigating police officer knew of the deaths as they occurred, one death immediately after the collision and the other a day later, such knowledge should not be attributed to the office of the State's Attorney, citing *People* v. *Pohl* (1964), 47 Ill. App. 2d 232, 197 N.E. 2d 759. In *Pohl*, it was held that the "proper prosecuting officer" means the State's Attorney and his assistants, not a police officer with actual knowledge of the facts. This holding was followed in *People* v. *Bressette* (1970), 124 Ill. App. 2d 469, —, 259 N.E. 2d 592, 594, where the court wrote:

> "Defendant suggests that modern police procedures, coupled with the statutory duties of a state's attorney to investigate possible crimes and attend prosecutions in the now unified circuit court, require that we impute the knowledge of the arresting officer to the state's attorney. We do not preclude a case in which the denial by a state's attorney that he has such knowledge may not be accepted where evidence in the record fairly points to a contrary conclusion, but this is not that case. • • • the subsequent prosecution was not barred because the previous charge was unknown to the proper prosecuting officer • • • "

The State contends that we should not presume that the prosecution had knowledge of the manslaughter offenses.

The State's Attorney for each county has the duty to attend court proceedings to prosecute felony and misdemeanor charges (Ill. Rev. Stat. 1973, ch. 14, par. 5.) "There is a presumption that the State's attorney performs the functions of his office according to the law and that he does his duty, which is a presumption regarding all officers but is not conclusive." (*People ex rel Hoyne* v. *Newcomer* (1918), 284 Ill. 315, 324.) A State's Attorney may rebut this presumption by denying that he was present to perform his official duties. In the absence of a denial, however, it must be presumed that he performed his statutory functions. In the context of the case at bar, it is presumed that an assistant State's Attorney attended respondent's trial on December 23 for FTRS, and that the prosecutor had full knowledge of the pertinent facts of the offense. The investigating officer's report states that two children died after being hit by respondent's vehicle. We believe and hold that in the context of this case, in the absence of a denial, the proper prosecuting officer is presumed to have had knowledge of the involuntary manslaughter offenses when the traffic offense was prosecuted. We would comment that in both *Pohl* and *Bressette*, the respective proper prosecuting officers actively denied knowledge of the other offenses, unlike the prosecutors in the instant case.

Since the requirements of section 3-3(b) were satisfied inasmuch as the offenses of involuntary manslaughter were known to the proper prosecuting officer at the time the prosecution for FTRS was commenced, were based upon the same act of driving in a manner likely to cause a collision as the offense of FTRS, and were within the juris-

diction of the juvenile division of the circuit court of Cook County, the trial court properly held that the later prosecution for involuntary manslaughter in the form of a petition for adjudication of wardship was barred by section 3-4(b) (1).

For the abovementioned reasons; the order of the circuit court of Cook County granting respondent's motion for discharge of the juvenile petition for adjudication of wardship is affirmed.

Order affirmed.

McNAMARA, P. J. and MEJDA, J., concur.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 27, 1978

James S. Veldman, Esq.
Room 568
Richard J. Daley Center
Chicago, IL 60602

Re: Illinois
v. John M. Vitale
No. 78- 2

Dear Mr. Veldman:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U.S. 33 (1972). Mr. Justice White and Mr. Justice Blackmun would grant certiorari and set the case for oral argument.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By
Edward H. Faircloth
Assistant

APPENDIX D

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

March 22, 1979

Hon. William J. Scott
Attorney General
188 W. Randolph Street
Chicago, IL 60601

Re: People State of Illinois, appellant, vs.
John M. Vitale, a Minor, appellee No. 49326

Dear Mr. Scott:

The Supreme Court today made the following announcement concerning the above entitled cause:

> In compliance with the mandate of the Supreme Court of the United States, it is hereby certified that the judgment of this Court as expressed in its opinion in this cause is based upon federal constitutional grounds.

Very truly yours,

Clerk of the Supreme Court

CLW: jae
cc: Bernard Carey
Lawrence G. Dirksen
Michael Rodak, Jr.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1845

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JUNE 11, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ILLINOIS

CHRONOLOGICAL LIST OF RELEVANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD, ORDERS ENTERED, AND REVIEWING COURT OPINIONS AND ORDERS ENTERED.

December 24, 1974—Petition for Adjudication of Wardships filed

February 27, 1975—Motion for Discharge filed on behalf of John Vitale

April 4, 1975—People's initial response to motion for discharge

May 5, 1975—People's memorandum in support of their response, filed

May 5, 1975—Memorandum in support of discharge, filed

June 9, 1975—Order of the Honorable Joseph C. Mooney dismissing the Petition for Adjudication of Wardship

June 20, 1975—Notice of Appeal on behalf of the People, filed

December 30, 1976—Opinion of the Appellate Court of Illinois, First District, affirming the dismissal

April 3, 1978—Opinion of the Supreme Court of the State of Illinois affirming the dismissal

July 14, 1978—First Petition for the Writ of Certiorari filed by the People of the State of Illinois (No. 78-2)

November 27, 1978—Order of the Supreme Court of the United States granting Certiorari, and remanding to the Supreme Court of Illinois for a determination of whether its decision was upon constitutional grounds

March 22, 1979—Certification by the Supreme Court of Illinois that its determination was on such grounds

June 11, 1979—Second Petition for Certiorari filed on behalf of the People of the State of Illinois (No. 78-1845)

October 1, 1979—Writ of Certiorari granted by the Supreme Court of the United States

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, JUVENILE DIVISION

In the interest of
JOHN M. VITALE
A Minor

No. 74J19898

PETITION FOR ADJUDICATION OF WARDSHIP

I, Captain Robert Zeilenga, on oath state* on information and belief:

1. John M. Vitale is a male minor born on April 23, 1958, who resides or may be found in this county at 38 Chippewa Drive, Thornton, Illinois.

2. The names and residence addresses of the minor's parents, legal guardian, custodian, and nearest known relative are:

	Name	Residence	City and State
Father			
Mother			
Legal guardian	Mr. Clement Viater	38 Chippewa Drive	Thornton, Illinois
Custodian			
Nearest known relative			

The minor and the persons named in this paragraph are designated respondents.

3. The minor is *delinquent,* otherwise in need of supervision, neglected or dependent by reason of the following facts:

Each of the paragraphs set forth on Page 2 hereof is hereby made a part hereof.

4. The minor is not detained in custody.

5. A detention hearing has been set for 1-2-75.

* If any facts are not known, so state in the appropriate spaces.

6. It is in the best interests of the minor and the public that the minor be adjudged a ward of the court.

I ask that the minor be adjudged a ward of the court and for other relief under the Juvenile Court Act.

_____
Petitioner

Signed and sworn to before me

December 24, 1974,

_____
Notary public OR CLERK OF COURT

Name

Attorney for

Address

City

Telephone

IN THE INTEREST OF John M. Vitale, a minor No. 74J19898

1. In that John M. Vitale has, on or about November 20, 1974 at Cook County, Illinois committed the offense of Involuntary Manslaughter in that he without lawful justification, while recklessly driving a motor vehicle caused the death of George Kech, in violation of Chapter 38, Section 9-3(a), Illinois Revised Statutes.

2. In that John M. Vitale has, on or about November 20, 1974 at Cook County, Illinois committed the offense of Involuntary Manslaughter in that he without lawful justification, while recklessly driving a motor vehicle caused the death of Carrilynn Christakos, in violation of Chapter 38, Section 9-3(a), Illinois Revised Statutes.

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—JUVENILE DIVISION

In the Interest of
JOHN M. VITALE,
A Minor

No. 74 J 019898

Filed February 27, 1975

MOTION FOR DISCHARGE DUE TO VIOLATION OF STATUTORY OR CONSTITUTIONAL DOUBLE JEOPARDY

Now comes the minor, JOHN M. VITALE, by his attorney, LAWRENCE G. DIRKSEN, and moves for discharge because the prosecution is barred due to the minor having been tried on December 23, 1974, in the Circuit Court of Cook County in South Holland, Illinois, for the offense of Failure to Reduce Speed to Avoid an Accident, Chapter 95½, Section 11-601(a) Illinois Revised Statutes, Complaint No. X2-480-263, and the present charge is barred by Illinois Revised Statutes, Chapter 38 C, Sections 3-3 and 3-4. In support thereof, it is stated as follows:

1. The minor, JOHN M VITALE, was arrested on November 20, 1974, and charged with violation of Illinois Revised Statutes, Chapter 95½, Section 11-601 (a) Failure to Reduce Speed to Avoid an Accident, Case No. X2-480-263. Subsequently a Petition for Adjudication of Wardship was filed in the Circuit Court of Cook County, Illinois, Juvenile Division, charging the minor with a violation of Illinois Revised Statutes, Chapter 38, Section 9-3(a), Involuntary Manslaughter (two counts). The same arrest formed the basis for all three charges. The time and place of occurrence were the same. The transaction was the same. The pertinent portions of each complaint are set forth below:

Complaint No. X2-480-263—Failure to Reduce Speed to Avoid an Accident.

Petition for Adjudication of Wardship—In that JOHN M. VITALE has, on or about November 20, 1974, at Cook County, Illinois, committed the offense of Involuntary Manslaughter in that he without lawful justification, while recklessly driving a motor vehicle caused the death of GEORGE KECH, in violation of Chapter 38, Section 9-3(a), Illinois Revised Statutes.

In that JOHN M. VITALE has, on or about November 20, 1974, at Cook County, Illinois, committed the offense of Involuntary Manslaughter in that he without lawful justification, while recklessly driving a motor vehicle caused the death of CARRILYNN CHRISTAKOS, in violation of Chapter 38, Section 9-3(a), Illinois Revised Statutes.

2. On December 23, 1974, the first Complaint, charging violation of Section 11-601(a) Chapter 95½, Illinois Revised Statutes, the minor proceeded to trial before The Honorable James Oakey in the Circuit Court of Cook County at South Holland, Illinois, and the minor was found guilty and a fine assessed against him.

3. The prosecution and/or conviction under the first Complaint is a bar to prosecution under the present Petition charging the minor with two counts of Involuntary Manslaughter.

4. Section 3-3, Chapter 38, Illinois Revised Statutes, provides that when the same conduct of a defendant may establish the commission of more than one offense, and that several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution unless the court orders that one or more such charges be tried separately.

5. Section 3-4(b) (1), Chapter 38, Illinois Revised Statutes, states that, "the prosecution is barred if the defendant was formally prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

> resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code (unless the Court ordered a separate trial of such charge); or was for an offense which involved the same conduct, unless each prosecution required proof of a fact not required on the other prosecution, or the offense was not consummated when the formal trial began."

6. The State's Attorney is, therefore, barred from prosecuting the present charges of Involuntary Manslaughter, since several offenses that arise out of the same conduct must be prosecuted in a single prosecution, and for the further reason that the minor herein has already been convicted of an offense which involves the same conduct in the instant case.

WHEREFORE, the minor, JOHN M. VITALE, by and through his attorney, LAWRENCE G. DIRKSEN, respectfully requests an Order dismissing the Petition and discharging the minor on the ground that prosecution thereof is violative of statutory and/or constitutional double jeopardy.

LAWRENCE G. DIRKSEN, Attorney
for JOHN M. VITALE, a minor

Lawrence G. Dirksen
Attorney at Law
3612 West Lincoln Highway
Olympia Fields, Illinois 60461
(312) 481-7400

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY—
COUNTY DEPARTMENT—JUVENILE DIVISION

In The Interest Of
JOHN M. VITALE
A Minor } Juvenile No. 74J 019898

ANSWER TO MOTION FOR DISCHARGE DUE TO VIOLATION OF STATUTORY OR CONSTITUTIONAL DOUBLE JEOPARDY

Now comes State's Attorney Bernard Carey through his Assistant State's Attorney, Marva Cohen to answer the motion for discharge alleging that the petition before the Juvenile Court alleging that John Vitale is a Delinquent minor (Ill.Rev.Stat.Ch.37§ 702-2) is barred because the minor had been tried on December 23, 1974 in the Circuit Court of Cook County, South Holland, Illinois for the offense of failure to obey the General Speed Restriction (Ill.Rev.Stat.Ch.95½ § 11-601 (a))

It is the States position that there is no bar to this prosecution. In support thereof it is stated as follows:

1. Respondent cited Ill.Rev.Stat.Chap.38 § 3-3 as support for his position that the Petition for Delinquency is barred by the prior traffic court proceeding. The pertinent part of section § 3-3 (b) requires that the several offenses be within the jures of a single court for there to be a bar.

For the respondent to sustain this position he must show that there was juris in the South Holland Court to conduct a hearing on a Petition for the adjudication of wardship alleging the minor is a delinquent in Violation of Illinois Revised Stat.Ch.37 § 702-2. This he has not done. Juris over a minor

always resides in the Juvenile Court (Ill.Rev.Stat.Ch.37 § 702-7 (1)) unless specifically exempted by statute as it is in the case of Traffic Offenses (Ill.Rev.Stat. Ch.37 § 702-7(2)), by motion of respondent (Illinois Revised Statutes Ch.37 § 702-7(5), or on motion of the State's Attorney (Ill.Rev.Stat.Ch.37 § 702-7 (3)).

As Illinois Rev.Stat.Ch.37 § 702-7(2) clearly exempts prosecution for traffic offenses from procedure under the Juvenile Court Act it is clear that Traffic Court had proper juris as to the traffic offense and Juvenile Court has proper juris as to the Delinquency matter.

Ch.38 § 3-3 does not apply here as construed by the respondent because as indicated supra neither court, Traffic Court or Juvenile Court, had proper juris for all the alleged offenses arising out of the occurence on January 20, 1974 (see Ch.38 § 3-3 (a))

In this case the State's Attorney did not elect to transfer the underlying criminal offenses to the juris of the Criminal Courts via 702-transfer and there was no judicial determination to that affect.

Re: Rahn-Ill.3d-319 N.E.2d 787 (1974) (cite) held that § 702-7 forbids criminal prosecution of a child under 17 without a just determination whether the minor is to be treated as an adult. In Rahn, a 16 year old was indicted, tried and convicted of arson. The Illinois Supreme Court reversed the conviction stating that the conviction would not stand where the State's Attorney did not petition Juvenile Court to prosecute defendant as an adult.

WHEREFORE, the state petitions this Court to deny respondent's motion.

BERNARD CAREY,
State's Attorney of Cook County

By MARVA COHEN,
Marva Cohen,
Assistant State's Attorney,
Juvenile Division

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT JUVENILE DIVISION

In The Interest Of

JOHN M. VITALE

A Minor

Juvenile No. 74-019898

REBUTTAL: MOTION FOR DISCHARGE
DUE TO VIOLATION OF STATUTORY
OR CONSTITUTIONAL DOUBLE JEOPARDY

To rebut adequately issues raised by the minor respondent, John Vitale, the state presents its arguments in the alternative.

I THE TRAFFIC OFFENSE FOR WHICH THERE WAS A CONVICTION IS NOT A LESSER INCLUDED OFFENSE TO THE PENDING JUVENILE PETITION.

A. Vitale has argued that his failure to obey the General Speed Restrictions (Ill. Rev. Stat., ch 95½, § 11-601 (a)) is a lesser included offense to the pending petition for the Adjudication for Wardship (Ill. Rev. Stat., ch. 37, 702-2) based upon the underlying offense of Involuntary Manslaughter (Ill. Rev. Stat., ch 38, 9-3). Ill. Rev. Stat., ch. 38, 2-9 defines included offense:

> . . . (A)n offense which . . . (i)s established by proof of the same or less than all of the facts. . . . than that which is required to establish the commission of the offense charged. . . .

There is no question that these two offenses arose at the same point in time. However, there is no showing that the same conduct gave rise to the separate offenses, or that the same proof would be required in both cases.

John Vitale was driving at a speed unreasonable for conditions as determined by the finding of guilt in the South Holland court; the exact speed is irrelevant. The question of speed, however, is not determinative of the cause of death of the children. An admission contained in the police report indicates Vitale had looked away. There are indications of brake failure.

The proof required for involuntary manslaughter is recklessness and not necessarily the recklessness involved in speeding. The speed may not have been the cause of the subsequent deaths and the speed per se is not employed as a "but for" test of recklessness which lead to the two deaths. Recklessness may have consisted of other aspects of the respondents behavior as noted above.

B. Ill. Rev. Stat., ch. 38, § 3-3 does not apply in this case. As the state discussed in its prior answer there is not a single jurisdiction in which these matters need be heard. Further, although these two offenses occurred close in time the Adjudication of Delinquency pending in Juvenile Court requires proof of facts not required for the other prosecution.

C. Ill. Rev. Stat., ch. 38, § 3-4 does not apply in this case.

The cases cited by Vitale are easily distinguishable from the situation before the Court. Cited are *People* v. *King,* 275 N.E. 2d 213 (1971), *People* v. *Dugan,* 305 N.E. 2d 308 (1973), & *People* v. *Brown,* 306 N.E. 2d 561 (1973).

In *King* the defendant was tried for indecent conduct (a municipal offense). Evidence was heard and jeopardy had attached. The court held a subsequent prosecution for deviate sexual assault was barred because the State admitted that the same conduct constituted the two charges.

In *Dugan* the defendant was indicted and tried for murder but convicted of the lesser included offense of manslaughter. The conviction was an implied acquittal of the murder charge and further prosecution was barred.

In both above cited cases the court was clearly dealing with lesser included offenses unlike the contention of the current case that a lesser included offense is not involved.

The significance of the citation by the respondent to *Brown* is unclear to the State since its holding is that jeopardy does not attach at a preliminary hearing.

The defendant is *Waller* v. *Florida*, 90 S. Ct 1184 (1971) had removed a canvas mural from the wall inside city hall and had carried it through the streets. During a scuffle with police the mural was damaged. After being convicted of violating two city ordinances (destruction of city property and disorderly breach of the peace) he was tried and convicted of violating the state law of grand larceny. The court made an *assumption* that the ordinance violated was a lesser included offense of the felony charge and stated the second trial constituted double jeopardy. It is the State's position that such an assumption can not be made in this case.

In the case of *Ashe* v. *Swenson*, 397 U.S. 436 (1970) the court held that the defendant who had been acquitted on a charge of robbery could not later be tried on a robbery charge growing out of the same incident and involving a second victim since the only issue in dispute during the prior proceeding was whether the defendant had been one of the robbers. The jury had found he was not. The court thus held the State was collaterally estopped from re-adjudicating a critical evidentiary issue for which there had been a prior determination by the trier of fact which lead to an acquittal.

The issues adjudicated by the South Holland are not those to be adjudicated in the pending juvenile matter. The South Holland court had no jurisdiction over the Delinquency matter before the Juvenile Court and could not have adjudicated them.

II. IN THE ALTERNATIVE, IF THE TRAFFIC OFFENSE IS HELD TO BE A LESSER INCLUDED OFFENSE TO THE PENDING JUVENILE PETITION, THE EARLIER CONVICTION IS VOID FOR LACK OF JURISDICTION.

If the court should find the offense of failure to obey the General Speed Restrictions is a lesser included offense the court must find the South Holland prosecution void for lack of jurisdiction.

In re Rahn, ____ Ill. 3d ____, 319 N.E. 2d 787 (1974) held that Ill. Rev. Stat, ch. 37, § 702-7 forbids criminal prosecution of a child under 17 years without a judicial determination whether the minor is to be treated as an adult. In *Rahn*, a 16 year old was indicted, tried and convicted of arson. The Illinois Supreme Court reversed the conviction stating that the conviction would not stand where the States Attorney did not petition the Juvenile Court to prosecute defendant as an adult.

Rahn stands for the proposition that there is original and exclusive jurisdiction in the juvenile court. A conviction is to be reversed if it does not originate in Juvenile Court. There is no question that the South Holland court had no jurisdiction over the Delinquency petition and if violation of Ill. Rev. Stat., ch 95½ § 11-601 (a) is a lesser included offense the South Holland court had no jurisdiction over that matter either.

Accordingly, the State contends that if the traffic offense is held to be a lesser included offense the South Holland courts adjudication is a nullity for want of jurisdiction, must be vacated and both matters must be heard before the Juvenile Court.

Respectfully Submitted,

Marva Cohen
Assistant State's Attorney
Juvenile Court
1100 S. Hamilton
Chicago, Illinois 60612

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—JUVENILE DIVISION

In the Interest of
JOHN M. VITALE,
A Minor

No. 74 J 019898

A REPLY TO STATE'S ANSWER TO MOTION FOR DISCHARGE

Lawrence G. Dirksen
Attorney at Law
3612 West Lincoln Highway
Olympia Fields, Illinois 60461
(312) 481-7400

STATEMENT OF FACTS

On November 20, 1974, JOHN M. VITALE, the minor herein, was returning to Thornwood High School shortly after noon. At the intersection of 170th and Ingleside Avenue, the car that he was operating struck two children, both of whom subsequently died.

The minor, JOHN M. VITALE, on the above-mentioned date was charged with the offense of "Failure to Reduce Speed to Avoid An Accident," in violation of 11-601 (a), Case No. X2-480-263. Subsequently, a Petition for Adjudication of Wardship was filed in the Circuit Court of Cook County, Illinois, Juvenile Division, charging the said minor with violation of Illinois Revised Statutes, Chapter 38, Section 9-3 (a) Involuntary Manslaughter (two counts).

On December 23, 1974, a bench trial before the Honorable James Oakey was held in the Circuit Court of Cook County at South Holland, Illinois, on the complaint charging the minor with violation of Sec. 11-601 (a) Chapter 95½. The minor was found guilty and a fine assessed against him. (See certified copy of ticket and order.)

The individual who signed the traffic complaint against the minor is the same person who signed the Petition for Adjudication of Wardship, namely, Captain Robert Zeilenga, of the South Holland, Illinois, Police Department.

* * * * * * * * * *

DISCUSSION

I. RESPONDENT'S CONVICTION OF "FAILURE TO REDUCE SPEED TO AVOID AN ACCIDENT" CONSTITUTED PRIOR JEOPARDY, PRECLUDING SUBSEQUENT PROSECUTION FOR INVOLUNTARY MANSLAUGHTER ARISING FROM THE SAME INCIDENT.

The People, in their Answer to Respondent's Motion for Discharge, have completely ignored the fundamental issue before the Court, and that is whether prosecution of Respondent in Juvenile Court for the two counts of Involuntary Manslaughter is barred due to the fact that he has already been tried and found guilty and sentenced on the charge of "Failure to Reduce Speed to Avoid An Accident," a charge that arose out of precisely the same transaction that is the basis of the Petition for Adjudication of Wardship now before this Court.

The People have neither denied nor taken issue with the following facts:

a. the same arrest formed the basis for the charge of Failure to Reduce Speed to Avoid an Accident and the two counts of Involuntary Manslaughter, and

b. the exact time and place of the occurrence for the multiple charges were the same, and

c. there was no clearly divisible conduct, i.e., all charges grew out of the same transaction.

The only argument made by the People is that the Juvenile Court is precluded from hearing traffic charges and, therefore, that the minor had to be tried in a different court for the traffic offense. This, of course, is neither the law nor is it responsive to the issue of double jeopardy. Chapter 37, Sec. 702-7, *Illinois*

Revised Statutes, merely allows a minor to be prosecuted in a court other than Juvenile Court for a traffic offense or an offense punishable by fine only. The Statute uses the word "may", but it in no way strips the Juvenile Court of jurisdiction over such cases. The State suggests that these multiple prosecutions are permissible because the person charged is a minor. On the contrary, the *Juvenile Court Act,* Chapter 37, Sec. 701-2 (3) (a), *Purpose and Policy,* states:

> "In all procedures under this Act .... the procedural rights assured to the minor shall be the rights of adults unless specifically precluded by laws which enhance the protection of such minors."

The above section not only affords minors the same procedural rights as adults but even greater rights. There is, therefore, just one question before this Court and that is whether or not the State is barred from proceeding on the present Petition on grounds of double jeopardy.

A. "A PROSECUTION IS BARRED IF THE DEFENDANT WAS FORMERLY PROSECUTED FOR A DIFFERENT OFFENSE, OR FOR THE SAME OFFENSE BASED UPON DIFFERENT FACTS, IF SUCH FORMER PROSECUTION:

> (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Sec. 3-3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began.

Illinois Revised Statutes, Chapter 38, Sec. 3-4 (b) (1).

The above Statute is a bar to the prosecution under the present Petition. The Courts of this state, in interpreting the above statute, have made it abundantly clear that a subsequent prosecution for an offense arising out of the same conduct that formed the basis for the initial prosecution is barred on grounds of double jeopardy. See *People* v. *King,* 275 N.E. 2d 213, (1971) and *People* v. *Brown,* 306 N.E. 2d 561 (1973). Also, in *People* v. *Dugan,* 305 N.E. 2d 308 (1973), the Court found that Sec. 3-4, Chapter 38, *Illinois Revised Statutes* provides that "a conviction of an included offense is an acquittal of the offense charged; and .... we have no alternative but to find that Defendant's original plea of guilty to the lesser included offense of involuntary manslaughter constitutes an acquittal of the original charge of murder, and any further prosecution therefore is barred." In the present case, both of the foregoing sets of circumstances exist the "same transaction" rule and the "conviction of an included offense" standard.

B. A SECOND PROSECUTION OF RESPONDENT CONSTITUTES DOUBLE JEOPARDY AND IS VIOLATIVE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

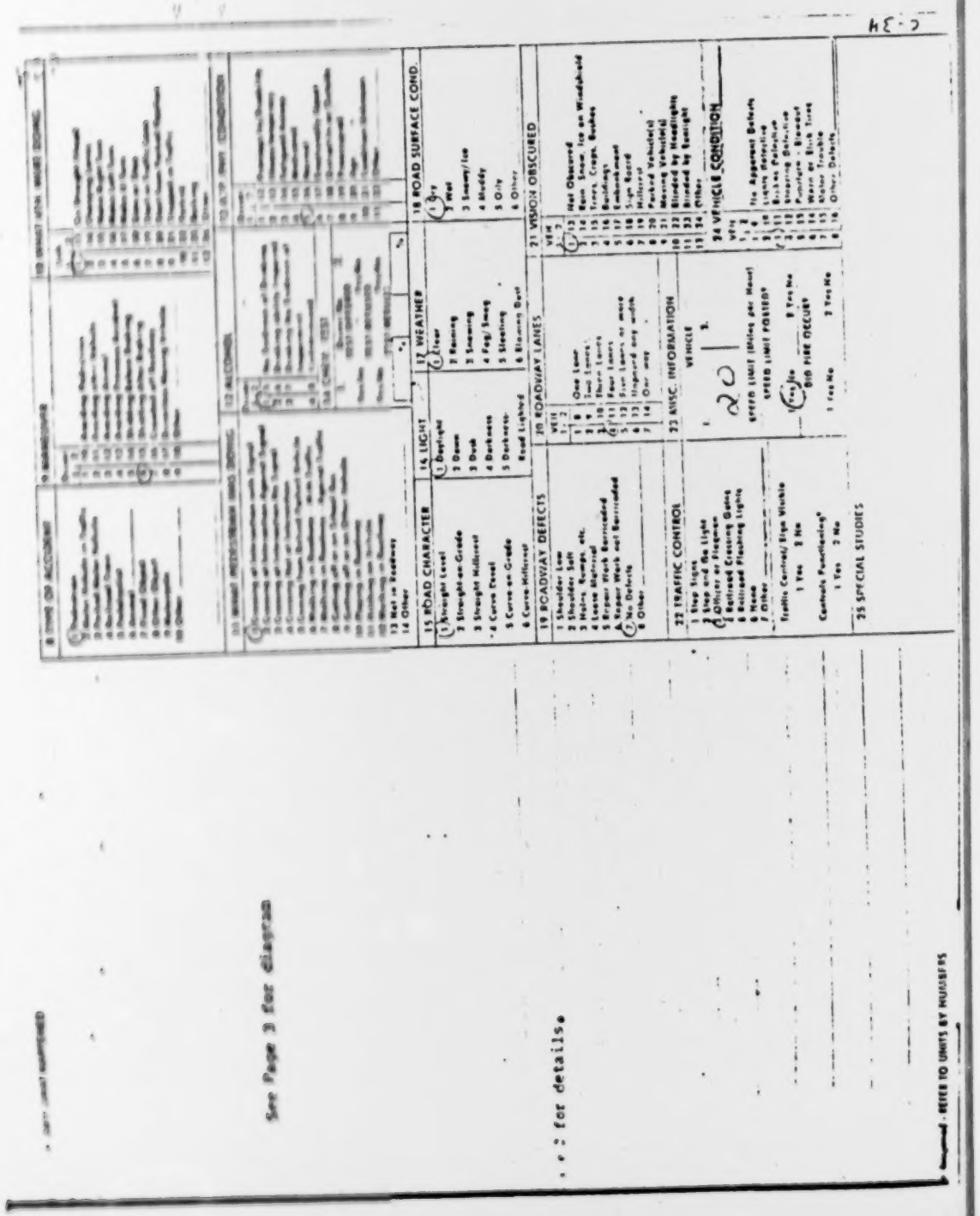
To argue Respondent's Motion for Discharge successfully, one need only refer to *Waller* v. *Florida,* 90 S. Ct. 1184 (1970). This case alone is controlling, in spite of or in addition to any statutory grounds foreclosing multiple prosecutions. The United States Supreme Court, with Chief Justice Berger writing the opinion, held that a defendant who had been convicted under a city ordinance for destruction of city property and disorderly conduct could not be tried by the State of Florida on a charge of grand larceny based on the *same acts* as were involved in violation of the ordinance. It was held that the second trial constituted double jeopardy and the double jeopardy provisions of the Fifth Amendment are applicable to the States. The essence of the holding was that since all charges

grew out of the "same criminal episode," a second, successive prosecution by the State was barred by the double jeopardy clause. To apply any less of a test in the present case because to the respondent is a juvenile, would ignore the mandate of the Supreme Court. In fact, in two cases well known to this Court, *In Re Winship*, 90 S. Ct. 1068 and *In Re Gault*, 87 S.Ct. 1428, the Court noted that the requirements of due process are determined by the nature of the interests which are affected by the proceedings and *not* by the descriptive label applied to them. The Court held that the distinction between "criminal" and "civil" proceedings provided an unpersuasive excuse for affording lesser safeguards to juveniles in delinquency proceedings than are given adults charged with violations of the criminal law. In the case at bar, the People's argument is grounded on just such an unpersuasive excuse that, if sustained, would admittedly afford lesser procedural safeguards to juveniles than to adults in identical situations.

WHEREFORE, the minor, JOHN M. VITALE, by and through his attorney, LAWRENCE G. DIRKSEN, respectfully requests an Order dismissing the Petition and discharging the minor on the ground that prosecution thereof is violative of statutory an/or constitutional double jeopardy.

JOHN M. VITALE, a minor, by his attorney, LAWRENCE G. DIRKSEN

Lawrence G. Dirksen
Attorney at Law
3612 West Lincoln Highway
Olympia Fields, Illinois 60461
(312) 481-7400



Department of Police

VILLAGE OF SOUTH HOLLAND, ILL.
John Rinkema, CHIEF

Page 2

Vehicle was westbound in the inner lane of 170th St. At Ingleside Ave. the children were in a market school crosswalk attempting to cross 170th St. from south to north. There was a school crossing guard on duty at that location, (Mrs. Arlene Lucas) and she was in full uniform in the middle of 170th with a stop sign displayed. She motioned for the children to come across. The vehicle struck both children as they ran across the street and in front of the vehicle.

Investigation revealed that the vehicle left 68 feet of skid marks to the east side of the crosswalk then continued for another 58 feet (126 ft. total) before coming to a stop. Victim Kech was caught in the under carriage of the car and dragged approximately 50 feet before the car stopped. Victim Christakos was thrown approximately 80 feet from the point of impact and was lying on the north curb. Point of impact is established to be in the inner lane approximately 13 feet south of the north curb and in or just outside of the west line of the crosswalk.

Victim Kech was pronounced dead at 12:45 PM by Dr. Orcutt at Ingalls Memorial Hospital, Harvey, Illinois. Coroners office notified and permission to move the body by Dep. Coroner Tragarz at 2:10 PM.

Driver of the vehicle stated that he was traveling westbound on 170th St. in the inside lane and was going about 25 MPH. His attention was diverted to the left and when he looked back again he saw the crossing guard in the middle of 170th St. holding a stop sign. He immediately applied his brakes and then saw the two children run in front of him. He stated he could not stop his vehicle in time to avoid a collision.

VILLAGE OF SOUTH HOLLAND, ILL.
John Rinkema, CHIEF

The crossing guard, Mrs. Lucas, stated that she had looked to the east and did not see a car coming, she looked to the west and saw a car about a block away. She walked out into 170th St. from the southwest corner of the intersection with her stop sign raised above her head. She made sure that the vehicle coming from the west stopped and she then motioned for the children to cross. They started running across and she heard tires squeal and the car came past her and struck the children.

During the investigation of skid marks, it was noted that the vehicle left no skid marks from the left front tire. It was suspected that the brakes may have been faulty. The car was taken into a testing lane, Weltmeyer & Son, Harvey, Illinois and a test was performed. This test indicated that the right front wheel had 100% braking power, left front had 70%, left rear 70% and the right rear 45%.

In an effort to establish the speed of the vehicle, tests were made with the vehicle on 170th St. at 4 PM 11-20-74 while the road conditions remained the same. The speed was established with radar and the following speeds and skid distances were recorded 30 MPH—35 ft. 40 MPH—57 ft. 51 MPH—115 ft. An attempt was also made to compute the speed of the vehicle by using the nomograph. By computing the speed in this manner it indicated that the vehicle was traveling approximately 52 MPH. It is therefore the opinion of the investigating officer that the vehicle was traveling in excess of 50 MPH.

The description of the location and streets is as follows: 170th St. is a 40 ft. wide 4 lane marked with a double yellow center line and spaced white lane lines, asphalt paved. The crosswalk is marked, by 2 white lines, 6 feet wide and runs from the west sidewalk along Ingleside Ave., NNWest to a driveway apron at 912 E. 170 St.

VILLAGE OF SOUTH HOLLAND, ILL.
John Rinkema, CHIEF

The driver stated that he entered westbound 170th St. at Prince Drive. A description of the traffic signs westbound from Prince Dr. to the crosswalk is as follows: a 35 MPH speed limit sign at Prince Drive, 1¾ blocks west, a written official school speed limit sign 20 MPH, ½ block west an official "Visual type" school zone ahead, at University St., school speed limit 20 MPH, at Greenwood Ave. a market crosswalk and official visual school crosswalk sign, just west of Greenwood a blind Person Crossing sign at Ellis Ave. an official school zone 20 MPH sign and then it is 460 feet to the crosswalk. There is a total of 7 official speed warning signs from Prince Drive to the crosswalk.

Further interviews will be attached to this report in statement form.

Additional information: November 21, 1974 2:00 PM Ingalls Memorial Hospital the SHPD that the Chiristakos girl had died. She was pronounced dead at 1:05 PM November 21, 1974 by Dr. Tobias. Coroners office notified at 3:45 PM date. Dept. Coroner Flanagan gave permission to move the body to funeral home of the families choice.

(Diagram of scene of collision drawn by officer omitted in printing.)

United States of America

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

PLEAS, before the Honorable JOSEPH C. MOONEY one of the Judges of the Circuit Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at the Court House, in the City of Chicago, in said County, and State, on June 9th, in the year of our Lord, one thousand nine hundred and seventy five and of the Independence of the United States of America, the one hundred and ninety eight.

PRESENT:—The Honorable JOSEPH C. MOONEY
Judge of the Circuit Court of Cook County.

BERNARD CAREY, State's Attorney.

RICHARD J. ELROD, Sheriff of Cook County.

Attest: MORGAN M. FINLEY, Clerk

BE IT REMEMBERED, that heretofore, to-wit: On the 9th day of June A.D. 1975, the following among other proceedings were had and entered of record in said Court to-wit:

JOHN M. VITALE 74 J 19898

PRIVATE ATTORNEY PRESENT; MOTION RESPONDENT SUSTAINED PROSECUTION BARRED; PETITION DISMISSED; CASE CLOSED.

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

I, MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain order had and entered of record on the 9th day of June A. D. 1975 in a certain cause lately pending in said Court, on the juvenile side thereof,

between Circuit Court of Cook County, Illinois in the interest of:

JOHN M. VITALE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County, this 22nd day of July 1975.

_____Clerk

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—JUVENILE DIVISION

In the Interest of
JOHN VITALE,
A Minor

No. 74 J 019898

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable JOSEPH C. MOONEY, Judge of the Circuit Court of Cook County, Illinois, Juvenile Division, on the 9th day of June, 1975.

PRESENT:

MR. BERNARD CAREY, State's Attorney,
By: MRS. MARVA COHEN and
MR. MAURICE DORE,
Assistant State's Attorneys,
Appeared for the State;

MR. LAWRENCE G. DIRKSEN,
Attorney at Law,
Appeared for the Minor Respondent.

* * * * * * * *

THE COURT: Well, nothing I have heard here this afternoon changes the conclusion I have reached. It may be erroneous, it may not. But I assume that in light of the fact, in light of Section 3-3, the provisions of Section 3-3 of Chapter 38, and the pertinent sections of 3-4 (b) (1) of the same section, Chapter 38, that at the time of the commencement of the prosecution of the traffic offense against the Respondent, several offenses were known to the prosecuting officer. That is, the prosecution knew of the deaths of the individual named in the petition filed herein. And that the statute required the several offenses to be prosecuted in a single prosecution. And that all of the elements of proof imposed upon the State could have been presented in a single trial of all charges. That all charges could have been presented in a single prosecution in the Juvenile Court of Cook County. The Court finds that our statutes are clear in controlling herein and that the various test mentioned in Ashe and Waller, namely collateral estoppel, same transaction, same evidence, need not be applied here. Accordingly, prosecution of the offense charged in this petition is barred pursuant to Chapter 38, Section 3-4 (b) (1). The petition is dismissed and the case closed. That's the order.

MR. DORE: Thank you. The State is going to ask leave of Court to appeal.

THE COURT: Certainly. Thank you.

(Which were all the proceedings had in the above-entitled case on said date.)

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION
CASE NO. 74-19898

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF,

vs.

JOHN VITALE, DEFENDANT(S).

NOTICE OF APPEAL

An Appeal is hereby taken from the Order or Judgment described below:

1. Court to which Appeal is taken:

   APPELLATE COURT OF ILLINOIS
   FOR THE FIRST DISTRICT

2. Name of Appellant:

   PEOPLE OF THE STATE OF ILLINOIS

3. Name of Appellant's attorney on Appeal and address to which notices shall be sent:

   BERNARD CAREY
   State's Attorney of Cook County
   Room 500
   Chicago Civic Center
   Chicago, Illinois 60602

4. Date of Order:

   June 9, 1975.

5. Order appealed from:

APPEAL FROM ORDER OF JUDGE DISMISSING PETITION AFTER he held that a plea in Traffic Court estopps a subsequent prosecution of a Delinquency petition

BERNARD CAREY
State's Attorney of Cook County

MAURICE M. DORE
Maurice M. Dore
BY: Assistant State's Attorney

DATE: June 20, 1975

(Notice of service omitted in printing.)

IN THE APPELLATE COURT
FIRST DISTRICT, ILLINOIS.

No. 62870

In the Interest of John M. Vitale, a minor

PEOPLE OF THE STATE OF ILLINOIS, APPELLANT

vs.

JOHN M. VITALE, A MINOR, APPELLEE

APPEAL FROM COOK CIRCUIT

I, Gilbert S. Marchman, Clerk of the Appellate Court, within and for the First District of the State of Illinois, and Keeper of the records, files and seal thereof, do hereby certify that the above and foregoing Transcript of Record filed on October 24, 1975 and marked 62870 is volume 1 of the record consisting of 1 volumes which constitutes the complete record filed in said cause in said Appellate Court.

In Testimony whereof, I have hereunto set my hand and seal of said Court, at Chicago, Illinois, this 17th day of June A.D. 1977.

/s/ Gilbert S. Marchman
Clerk of the Appellate Court,
First District, Illinois

IN THE

SUPREME COURT OF ILLINOIS

No. 49326

In Re JOHN M. VITALE, a Minor, 71 Ill.2d 229, 375 N.E.2d 87 (1978):

(The court's opinion of April 3, 1978, together with the dissenting opinion of the same date, is reproduced in full as Appendix A of the Petition for Certiorari in the present case. It will be found at pages A1 through A22 of the Petition).

IN THE

APPELLATE COURT OF ILLINOIS,

FIRST DISTRICT

No. 62870

IN THE INTEREST OF JOHN M. VITALE, a Minor, 44 Ill.App.3d 1030, 357 N.E.2d 1288 (1977):

(The court's opinion of December 30, 1976 is reproduced in full as Appendix B of the Petition for Certiorari in the instant case. It will be found at pages B1 through B10 of the petition).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 27, 1978

James S. Veldman, Esq.
Room 568
Richard J. Daley Center
Chicago, IL 60602

Re: Illinois
v. John M. Vitale
No. 78-2

Dear Mr. Veldman:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda,* 409 U.S. 33 (1972). Mr. Justice White and Mr. Justice Blackmun would grant certiorari and set the case for oral argument.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By EDWARD H. FAIRCLOTH
Edward H. Faircloth
Assistant

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

March 22, 1979

Hon. William J. Scott
Attorney General
188 W. Randolph Street
Chicago, IL 60601

Re: People State of Illinois, appellant, vs.
John M. Vitale, a Minor, appellee No. 49326

Dear Mr. Scott:

The Supreme Court today made the following announcement concerning the above entitled cause:

In compliance with the mandate of the Supreme Court of the United States, it is hereby certified that the judgment of this Court as expressed in its opinion in this cause is based upon federal constitutional grounds.

Very truly yours,

Clerk of the Supreme Court

CLW: jae
cc: Bernard Carey
Lawrence G. Dirksen
Michael Rodak, Jr.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

October 1, 1979

Melbourne A. Noel, Jr., Esq.
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601

RE: *Illinois* v. *John M. Vitale*
No. 78-1845

Dear Mr. Noel:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the rules.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By JUNE M. HOFFMANN
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures

78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-2

In the Interest of JOHN M. VITALE, a minor,

(STATE OF ILLINOIS,

Petitioner,

vs.

JOHN M. VITALE,

Respondent.)

BRIEF OF RESPONDENT IN OPPOSITION

LAWRENCE G. DIRKSEN
3612 West Lincoln Highway
Olympia Fields, Illinois 60461
(312) 481-7400
Attorney for Respondent

GARY F. FELICETTI
Of Counsel

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-2

In the Interest of JOHN M. VITALE, a minor,

(STATE OF ILLINOIS,

Petitioner,

VS.

JOHN M. VITALE,

Respondent.)

BRIEF OF RESPONDENT IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.

AFTER HAVING BEEN TRIED AND CONVICTED IN A STATE COURT FOR THE OFFENSE OF FAILURE TO REDUCE SPEED TO AVOID AN ACCIDENT, THE DOUBLE JEOPARDY CLAUSE PRECLUDED JOHN VITALE FROM BEING SUBSEQUENTLY AND FURTHER PROSECUTED ON CHARGES OF INVOLUNTARY MANSLAUGHTER.

It is interesting to note that even at this late date the People persist in inserting in their brief and attempting to insert into the record what they want the Court to

believe are the facts in this case. Nowhere in the record is there *anything* to support the People's statements that Vitale "completely disregarded posted school speed limits . . . at an excessive rate of speed and in disregard of the signal of a school crossing guard." These repeated, inflammatory statements suggested by the People to be facts apparently had some influence on Mr. Justice Underwood of the Supreme Court of Illinois who disagreed with the majority holding "which permits a defendant who has caused two deaths to escape punishment other than a nominal fine." Mr. Justice Underwood, in his dissent, accepted the People's version, *i.e.*, a so-called police report never in evidence, as a factual basis for his application of the law. The issue before the Court is not what is proper punishment but rather the application of the Double Jeopardy Clause to this particular case. Perhaps it would be worthwhile to briefly correct the record.

John Vitale entered a plea of *not guilty* to the offense of failure to reduce speed to avoid an accident. He was tried in a state court and found guilty. The officer who issued the traffic citation and subsequently filed the manslaughter charges, testified for the State, as did a school crossing guard. John Vitale testified in his own behalf and was represented by counsel. No court reporter was present and thus no record of the proceedings was made. The following day Vitale was charged with two counts of involuntary manslaughter filed by the same officer who testified against him in court the day before. That is it. That is what is known about this case and nothing more. The Appellate Court of Illinois was satisfied that the State had simply failed to comply with the compulsory joinder statutes, but the Illinois Supreme Court found an additional and even "more compelling reason why respondent cannot be

prosecuted for the offense of involuntary manslaughter" . . . the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.

1.

SEPARATE STATUTORY OFFENSES NEED NOT BE IDENTICAL TO THE SAME FOR PURPOSES OF DOUBLE JEOPARDY.

In the majority opinion below, the late Mr. Justice Dooley cites the case of *Brown v. Ohio* (1977), 432 U.S. 161, where prosecution and punishment for joyriding prohibited prosecution and punishment for automobile theft. Joyriding was the mere taking of an auto without the owner's permission whereas auto theft required proof of intent to permanently deprive the owner of possession. He then quotes this Court referring to the Double Jeopardy Clause,

> "It has long been understood that separate statutory crimes need not be "identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibitions."

Mr. Justice Dooley goes on to conclude that the two separate statutory offenses of failure to reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the "same" within the Double Jeopardy Clause. In a case which respondent has cited from the very beginning, *Waller v. Florida*, 397 U.S. 387, the holding of the Court was similar to the holding in *Brown*, supra, in that the Court barred successive prosecutions even though the city ordinance and state offenses were separate and distinct in law and different elements of proof were required. The Court held that a defendant who was convicted in a municipal court of ordinance violations for

destruction of city property could not be tried later in a state court on a charge of grand larcency, based on the same acts as were involved in violation of the ordinance.

In the present case, the People have conceded that all offenses arose out of the same, single incident. In fact, it is clear that both the traffic offense and the manslaughter offenses necessarily had to arise from the "same act," that is, the accident. There could have been no offense of failure to reduce speed to avoid an accident without the accident, and there could have been no manslaughter offense without the same accident resulting in death. John Vitale has already been once tried and convicted on this traffic accident and the Double Jeopardy Clause prohibits him from being tried on the same act again.

2.

FOR PURPOSES OF DOUBLE JEOPARDY, CONVICTION OF LESSER INCLUDED OFFENSE PRECLUDES PROSECUTION OF GREATER OFFENSE, AS CONVICTION OF GREATER OFFENSE PRECLUDES PROSECUTION OF LESSER OFFENSE.

Although we have no transcript of John Vitale's trial on the traffic offense, it is reasonable to assume that the testimony taken there would be the same at any subsequent trial of John Vitale, regardless of what charge or charges the State chose to file against him. Would the People press their argument that the traffic charge herein is not a lesser included offense of involuntary manslaughter if the manslaughter trial had taken place first? I doubt very seriously that the People would say they could prosecute John Vitale on the traffic charge, at a later date in a separate court, *after* they had tried him on charges of involuntary manslaughter. This point is well illustrated in *Harris v. Oklahoma*, 53 L.Ed. 1054

(1977), where the defendant was convicted of felony murder in state court, arising from an armed robbery, and subsequently convicted in District Court of the offense of robbery with firearms. The Court held that the Double Jeopardy Clause barred prosecution of the lesser crime after conviction for the greater one. At page 1056, the Court stated that

> ". . . a person who has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

Even though in *Harris* the defendant was tried on the greater charge first, and in the present case Vitale was tried on the lesser charge first, as the Illinois Supreme Court noted in its opinion below, the sequence of the prosecution is immaterial. The offense of failure to reduce speed requires no proof beyond that which is necessary for conviction of the greater offense, involuntary manslaughter. Mr. Justice Dooley stated,

> "Accordingly for purposes of the double jeopardy clause, the greater offense is by definition the "same" as the lesser offense included within it. Failing to reduce speed and involuntary manslaughter cannot be fragmented so as to create different offenses."

If the People's position were carried to its logical conclusion in this case, they would be able to have any number of separate and successive prosecutions as a result of John Vitale's *single act* of failure to reduce speed to avoid an accident. What would stop them from filing charges and demanding separate trials for such offenses as reckless driving, reckless conduct, speeding, too fast for conditions and numerous other similar offenses. Obviously, they would not be permitted to do so and this is amply demonstrated in *Brown v. Ohio*, 432

U.S. 161 (1977) where, in reversing Brown's second conviction, the Court stated at page 196,

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Vitale's conviction of failure to reduce speed precludes his conviction of involuntary manslaughter, just as conviction of involuntary manslaughter would have precluded his conviction of failure to reduce speed to avoid an accident.

3.

INTERPRETATION OF DOUBLE JEOPARDY CLAUSE IN *VITALE* BASED ON PRECEDENT.

The case which the People refer to, *People v. Zegart*, No. 51229, is totally different than the case at bar. There, Marla Zegart entered a plea of *guilty* and then apparently set it up as a bar to subsequent prosecution for reckless homicide.

John Vitale entered a plea of *not guilty*. There was direct examination and cross examination of both the State's witnesses and Mr. Vitale who was represented by counsel. The case was heard in its entirety and the ultimate facts were determined by a trial judge. The final judgment of guilty was made by a trier of fact, not by a simple plea of guilty to a traffic charge, where no testimony is taken or, as in most cases, where the traffic ticket is paid without a court appearance by the defendant.

If there has been any misinterpretation of *Vitale*, it is most likely due to the fact that the printed decision of the Illinois Supreme Court stated that Vitale had entered a plea of guilty which, of course, was not the case.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari to the Illinois Supreme Court should be denied.

Respectfully submitted,

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No. 78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AND ARGUMENT FOR PETITIONER

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STATE OF ILLINOIS PROVISIONS

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vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AND ARGUMENT FOR PETITIONER

Pursuant to this Court's order of October 1, 1979 granting the Writ of Certiorari in the instant case, your Petitioner, the State of Illinois, respectfully requests that this Honorable Court set aside the decision of the Supreme Court of Illinois which was originally rendered in this case on April 3, 1978. Pursuant to the directive of this Court, the Illinois Supreme Court has, on March 22, 1979, certified that the basis of its opinion is its interpretation of the double jeopardy provisions of Amendment V of the Constitution of the United States, as applied to the facts in the present case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois holding that a Petition for Adjudication of Wardship filed against the then minor respondent, John M. Vitale, violated Vitale's right against being twice placed in jeopardy for the same offense, was rendered by that court on April 3, 1978. It is reported as *In Re. Vitale, a Minor,* at 71 Ill.2d 229, 375 N.E.2d 87 (1978). In turn, the opinion of the Illinois Supreme court which is the basis of the present proceeding on Certiorari affirmed the result reached by the Appellate Court of Illinois, First District, although for markedly different reasons. The opinion of the Appellate Court of Illinois, First District, is reported at 44 Ill. App.3d 1030, 357 N.E.2d 1288 (1977). In conformity with Rule 23 of the Supreme Court of the United States, each of these opinions was appended in full to the Petition for Certiorari filed by the People in the instant case. The Illinois Supreme Court and Appellate Court opinions appear in the Petition for Certiorari as Appendix A and Appendix B respectively.

Following the rendition of the decision of the Illinois Supreme Court, the People of the State of Illinois sought review by this Honorable Court upon the Writ of Certiorari. On July 14, 1978, the People filed a Petition for Certiorari which was docketed in the Supreme Court of the United States as No. 78-2. On November 27, 1978, this Court entered an order granting the Writ of Certiorari, vacating the judgment of the Supreme Court of Illinois, and remanding the case to the Supreme Court of Illinois for that court to determine whether its decision was based on Federal Constitutional grounds, state grounds, or both. (A. 37) On March 22, 1979, the Illinois Supreme Court certified to this Court that its original decision in the instant case was based upon its interpretation of the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States. (A. 38)

Following this certification by the court below, the People of the State of Illinois filed a second Petition for Certiorari in this Honorable Court. That Petition, filed on June 11, 1979, was docketed as No. 78-1845. On October 1, 1979, this Court granted the Writ of Certiorari and set down a schedule for briefs and arguments. (A. 39)

Pursuant to the order of October 1, 1979, the People of the State of Illinois now submit the instant brief on behalf of Petitioner.

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court herein sought to be reviewed was rendered by this court on April 3, 1978. On March 22, 1979, pursuant to an order of the Supreme Court of the United States, the Illinois court certified that its decision was based upon Federal Constitutional grounds. (A. 38) In light of that certification it is now clear that the question presented by the present case is one of interpretation of provision of the Constitution of the United States. Furthermore, jurisdiction of this Court is invoked, as it was in the Petition for Certiorari, under 28 U.S.C. Sec. 1257(3), since in the proceedings in the Illinois courts below the Respondent had set out and maintained an allegation of violation of his rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation".

QUESTIONS PRESENTED

1. Whether the Respondent, who struck and killed two small children while driving his automobile through an intersection at an excessive rate of speed and in complete disregard of the signal of a school crossing guard, may be properly made the subject of wardship proceedings charging him with involuntary manslaughter, notwithstanding the fact that he was charged with and fined for the traffic offense of failing to reduce speed to avoid an accident, which charge arose out of the same incident.

2. Whether the offenses of failing to reduce speed of an automobile and involuntary manslaughter, as defined by the legislature of the State of Illinois, are separate offenses for the purpose of the concept of double jeopardy:

3. Whether the traffic offense could possibly be said to be a lesser included offense of involuntary manslaughter in view of the fact that the so-called lesser offense is not, by necessity, contained within the so-called greater offense.

STATEMENT OF THE CASE

On November 20, 1974, an automobile driven by John M. Vitale, then a minor, struck two small children, Carrilynn Christakos and George Kech. (A. 4) One of the children, George Kech, died almost immediately after being struck. (A. 23) The other child, Carrilynn Christakos, died on the following day at Ingalls Memorial Hospital. (A. 25) The children were five years old at the time of their deaths.

A report summarizing police investigation of the incident appears of record and was made use of in the factual statements made by the Supreme Court of Illinois below. (A. 21-A. 26)

According to the investigation of police at the scene, the two children were struck in a marked crosswalk as they were being assisted across the street by a uniformed school crossing guard who was displaying a hand-held stop sign. (A. 23) Police investigation revealed the presence of skid marks at the scene indicating that at the time of the collision the vehicle being driven by Vitale was traveling at a speed of fifty miles per hour. (A. 23-A. 24) At the time there was in effect a twenty mile per hour school speed limit. (A. 25) The area, at times when school was not in session, was posted with a speed limit of thirty five miles per hour. There were some seven signs warning of the school zone and the twenty mile per hour school speed limit posted along the route which John Vitale drove in reaching the intersection at which the two children were struck and killed. (A. 25) The police were also able to determine that three out of the four breaks on the automobile which Vitale was driving were faulty. (A. 24) The Respondent told a police officer at the scene that while driving his attention was diverted to his left and that, when he looked back in the direction in which he was driving, it was already too late for him to avoid running down the two children. (A. 23) The officer on the scene issued a traffic citation charging John Vitale with failure to reduce speed to avoid an accident. Ill.Rev.Stat., Ch. 95½, Sec. 11-601. (A. 5) On December 23, 1974, the traffic case was heard in the Circuit Court of Cook County at South Holland, Illinois. (A. 6) Vitale entered a plea of not guilty to the traffic charge, he was tried, found guilty, and fined in the sum of fifteen dollars ($15.00).

On the following day, December 24, 1974, the Respondent was charged with involuntary manslaughter in connection with the deaths of the two children. (A. 4) Because he was a minor at the time, the charges took the form of a Petition for Adjudication of Wardship, a proceeding in Juvenile Court to determine Vitale's delinquency. (A. 2-A. 4) Vitale filed a motion to dismiss the wardship petition alleging, *inter alia,* that

by virtue of having been convicted and fined on the charge of failing to reduce speed to avoid an accident his constitutional right against being twice placed in jeopardy for the same offense was violated by the involuntary manslaughter charges contained in the petition. (A. 5-A. 7) The judge in Juvenile Court dismissed the wardship petition pursuant to Vitale's motion. (A. 27-A. 30) From this determination, the People appealed under authority of Rule 604 of the Supreme Court of Illinois. Ill. Rev. Stat., Ch. 110A, Sec. 604(a). (A. 31-A. 32) The Appellate Court of Illinois, First District determined that the judge correctly dismissed the petition since, they decided it had violated certain provisions of the Illinois Criminal Code dealing with joinder of causes in action. *In Re. Vitale,* 44 Ill.App.3d 1030, 357 N.E.2d 1288 (1977).

The People sought and obtained Leave to Appeal to the Supreme Court of Illinois from the determination of the Appellate Court. With Justices Underwood and Ryan strongly dissenting the Illinois Supreme Court held on April 3, 1978, that the Petition for Adjudication of Wardship was properly dismissed for the reason that it violated Vitale's right under the Fifth Amendment to the United States Constitution against being twice placed in jeopardy for the same offense. The court's majority held that in view of the fact that Vitale had been fined for the traffic offense of failing to reduce speed to avoid an accident, he could not be charged with involuntary manslaughter in the deaths of the two young children. The dissenting opinion pointed out that these two offenses were not the same in law or in fact, that under Illinois law the traffic charge was not a lesser included offense of the charge of involuntary manslaughter, and that there was herein no violation of the double jeopardy provisions of the Fifth Amendment to the United States Constitution. (See, Petition for Certiorari pp. A. 9 through A. 22.)

Seeking to overturn the determination of the majority of justices of the Supreme Court of Illinois, the People sought from this Honorable Court review on the Writ of Certiorari. In case No. 78-2, *State of Illinois* v. *Vitale,* this court granted Certiorari. On November 27, 1978, the majority of justices of this Court vacated the judgment of the Supreme Court of Illinois and remanded the cause to that court for determination of whether its decision was based upon a Federal Constitutional question. (A. 37)

Upon remand to the Supreme Court of Illinois, that court certified, on March 22, 1979, that its decision in the instant case was founded squarely upon its interpretation of the double jeopardy prohibition contained in Amendment V of the Constitution of the United States. (A. 38)

Pursuant to this certification, the People of the State of Illinois filed a second Petition for Certiorari in this Court, docketed as No. 78-1845 on June 11, 1979. On October 1, 1979, this Court granted the Writ and ordered the parties to file briefs. (A. 39) The present brief is now filed pursuant to this order.

SUMMARY OF ARGUMENT

The position of the State of Illinois in the instant case is that no violation of Respondent's rights under the Fifth Amendment of the United States Constitution occurred in his being charged with involuntary manslaughter in the deaths of young Carrilynn Christakos and George Kech, notwithstanding the fact that a fine has previously been imposed upon him for the traffic offense of failing to reduce the speed of his vehicle to avoid an accident. The arguments set forth in support of this position may be briefly summarized in the following manner.

1. **Lack Of Identity Of Offenses For Double Jeopardy Purposes.**

The concept of double jeopardy embodied within Amendment V of the United States Constitution is a protection against

being twice tried or punished for the *same offense.* The appropriate test is whether each offense which may arise from a single act involves an element of proof which the other does not. *Blockburger* v. *United States,* 284 U.S. 299 (1934). When under this classic test the two offenses charged are not the same offense, there is no violation of the prohibition against an improper second jeopardy.

In the present case, involuntary manslaughter and failing to reduce the speed of an automobile to avoid an accident are not the same offense as contemplated by the Fifth Amendment. On the contrary, the first does not necessarily involve an automobile at all, while the second does not necessarily involve death, or for that matter even a collision. The traffic offense, after all, is failing to reduce speed to avoid an accident. This does not entail striking any person or property. On the other hand, involuntary manslaughter involves no necessity of use of an automobile. Each offense is a separate and distinct offense. Therefore, they are not the *same offense* for double jeopardy purposes. The majority of the Supreme Court of Illinois was incorrect in holding to the contrary, as will be more amply shown in the full arguments to follow.

2. **Lack of Identity Of Traffic Offense As Lesser Included Offense Of Involuntary Manslaughter.**

While it may be true that a lesser included offense is the same offense as the greater offense, *Brown* v. *Ohio,* 432 U.S. 161 (1977), it is not correct, as held by the majority of the Supreme Court of Illinois below that failure to reduce speed to avoid an accident is a lesser included offense of involuntary manslaughter. In order to be a lesser included offense, it must always be true that the so-called lesser offense is included by definition in the so-called greater. *Virgin Islands* v. *Acquino,* 378 F. 2d 540 (3rd Cir., 1967), and decisions of this Court cited in the principle argument. Clearly the elements which must be proven under the respective Illinois statutes herein involved are not such that the offense of involuntary manslaughter will always

include the commission of the offense of failing to reduce speed to avoid an accident. Involuntary manslaughter may take many forms having nothing to do with speed, or even with the driving of an automobile; while failure to reduce speed need involve neither death nor even collision with any person.

Therefore, the Illinois Supreme Court incorrectly found that failing to reduce speed to avoid an accident was a lesser included offense of involuntary manslaughter. Thus, the determination of that court that double jeopardy was violated is completely unfounded.

ARGUMENT

THE PETITION CHARGING JOHN VITALE WITH INVOLUNTARY MANSLAUGHTER IN THE DEATHS OF TWO SMALL CHILDREN WAS PROPERLY FILED NOTWITHSTANDING A PRIOR FINE IMPOSED ON HIM FOR THE TRAFFIC OFFENSE OF FAILING TO REDUCE SPEED, AND DID NOT VIOLATE VITALE'S RIGHT TO BE FREE FROM AN IMPROPER SECOND JEOPARDY FOR THE SAME OFFENSE.

I.

THE TWO OFFENSES HERE WERE NOT THE SAME OFFENSE FOR PURPOSES OF DOUBLE JEOPARDY BUT, ON THE CONTRARY, WERE SEPARATE OFFENSES ARISING FROM A SINGLE ACT; THEREFORE, THERE WAS NO VIOLATION OF RESPONDENT'S RIGHTS UNDER THE FIFTH AMENDMENT WHEN, FOLLOWING IMPOSITION OF THE TRAFFIC FINE, HE WAS CHARGED WITH INVOLUNTARY MANSLAUGHTER.

As we have indicated above, John Vitale drove his automobile at a high rate of speed into an intersection guarded by a school crossing guard. In disregard of the guard's signal, and while operating an automobile on which three out of four breaks were faulty, Vitale struck and killed two young children who were attempting to cross under the guard's direction. Vitale was charged with failing to reduce speed to avoid an accident and was convicted and fined on that traffic charge. Subsequently, he was charged with involuntary manslaughter in the deaths of the children. These charges were dismissed, and the People appealed. The majority of the Supreme Court of Illinois held that the petition charging Vitale with involuntary manslaughter violated the prohibition against placing a person

in jeopardy more than once for the same offense. That court determined that the two offenses, failing to reduce speed to avoid an accident and involuntary manslaughter, were the same offense for double jeopardy purposes. Their opinion also found that the traffic offense was a lesser included offense of involuntary manslaughter and, thus, the two were the same offense. In each of these determinations the majority of the Illinois Supreme Court was incorrect.

In his dissenting opinion in the Supreme Court of Illinois, Mr. Justice Underwood, with whom Mr. Justice Ryan joined, stated (Petition for Certiorari, P. A. 8):

> "I have inflicted this lengthy dissent upon the reader because I believe the majority of this court has substantially broadened the double jeopardy rule it purports to follow, reaching a result which is compelled by neither the Federal Constitution nor the constitution or statutes of Illinois."

Mr. Justice Underwood then went on to analyse the problem finding (1) that the traffic offense and the offense of involuntary manslaughter are not the same offense for purposes of double jeopardy, and (2) that the traffic offense is not a lesser included offense of involuntary manslaughter. We submit that in so determining Justice Underwood was correct. In fact, the prohibition against double jeopardy was in no sense violated in the present case.

That under our system of justice one may not be twice placed in jeopardy for the same offense is abundantly clear. Constitution of the United States, Amendment V; Constitution of the State of Illinois, Article 1, Sec. 10; *United States* v. *Jorn*, 400 U.S. 470 (1971). The statutes of the State of Illinois further implement this policy in that they provide that a second prosecution for the same offense will not lie (Ill. Rev. Stat., 1977, Ch. 38, Sec. 3-4), and that when offenses can and should be tried together they may not be separately tried unless demands of due process and fairness require that the trial court

sever them. Ill. Rev. Stat., 1977, Ch. 38, Sec. 3-3.[1] The underlying purpose of the double jeopardy prohibition is to prevent the prosecution from making repeated attempts to convict the accused for the same offense and to eliminate the accompanying risk that, though he might be innocent, defendant might eventually be convicted. *Green* v. *United States,* 355 U.S. 184 (1955). What is sought to be prevented is multiple prosecution and/or punishment for the *same offense. United States* v. *Dinitz,* 424 U.S. 600 (1976); *United States* v. *Wilson,* 420 U.S. 332 (1975); *North Carolina* v. *Pierce,* 395 U.S. 711 (1968). What is sought to be prevented by the double jeopardy concept can be seen by the factual situation in cases such as *People* v. *Stickler,* 31 Ill. App. 3d 977, 334 N.E. 2d 475 (4th Dist., 1975). There the court found it a violation of double jeopardy concepts for the defendant, who had earlier plead guilty to and been convicted of the theft of certain rings, to be again prosecuted for the theft of those same rings along with certain saddles taken by him at the same time and as part of the same offense.

However, the double jeopardy concept concerns itself with the identity of the offenses and not with the identity of the act or series of acts out of which they arise. *Blockburger* v. *United States,* 284 U.S. 299 (1934); *Ciucci* v. *Illinois,* 355 U.S. 571

[1] It should be noted here in passing that in so far as these Illinois statutes deal with the state concept of compulsary joinder, they are not before us for consideration. While the aspect of compulsary joinder under Illinois statutes was mentioned in the trial court, and formed the principle basis for the opinion of the Appellate Court, First District, the Supreme Court of Illinois has specifically certified that its opinion rests not upon this concept but upon the Fifth Amendment prohibition against double jeopardy. Our inquiry here is thus limited to the Federal Constitutional question. Furthermore, since the Illinois Supreme Court has certified the basis of its opinion to be the Federal question, it has not finally determined the applicability of state compulsary joinder to this case. This being so, the question of interpretation of those state statutory concepts is not before this Court in the instant case. *Garner* v. *Louisiana,* 386 U.S. 157 (1961).

(1958). The same rule has in the past been followed many times by the Supreme Court of Illinois. *People* v. *Joyner,* 50 Ill.2d 302, 278 N.E.2d 756 (1972); *People* v. *Hairston,* 46 Ill.2d 348, 263 N.E.2d 840 (1970), *Cert. denied,* 402 U.S. 972 (1971). When a single act encompasses more than one offense, there is no prohibition against separate trials, convictions or punishment as to each of the separate and distinct offenses. *Gavieres* v. *United States,* 220 U.S. 338 (1911). In fact, it has been said that in order that two offenses arising out of the same act may not be separately prosecuted under the concept of double jeopardy, it is necessary that the two offenses be in law and in fact the same offense. *United States* v. *Linetski,* 533 F.2d 592 (5th Cir., 1976). See also, *People* v. *Allen,* 368 Ill. 368, 14 N.E.2d 397 (1938), *Cert. denied,* 308 U.S. 511 (1939). The test is not whether a single act or series of acts is involved. The test is that which has become commonly known as the "same evidence" test. That is, the appropriate test is whether each of the charges arising out of the same act or series of acts involves an element of proof which the other does not. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Jeffers* v. *United States,* 432 U.S. 137 (1977); *Blockburger* v. *United States, supra.; United States* v. *Smith,* 574 F.2d 308 (5th Cir., 1978). As this Court stated in *Ianneilli* v. *United States,* 420 U.S. 770 (1975), when each charged offense requires proof different from the other, there is no violation of the right to be free from double jeopardy although there may be a substantial overlap in the elements which must be proven to constitute each of the charged offenses. See also, *Weller* v. *Florida,* 397 U.S. 387 (1970). As Mr. Chief Justice Burger phrased it in his dissenting opinion in *Ashe* v. *Swenson,* 397 U.S. 436, 463 (1969), "The concept of double jeopardy and our firm constitutional commitment is against repeated trials for *the same offense.* This Court, like most American jurisdictions, has expanded that part of the Constitution into a 'same evidence' test". (Emphasis the Court's.)

When a single act constitutes more than one offense, and those offenses are not the same offense under the *Blockburger* criteria, double jeopardy does not prohibit separate convictions and separate sentences for each of the offenses involved. *United States* v. *Wheeler,* 435 U.S. 313 (1978). Put another way, multiple convictions arising out of the same act are perfectly proper as long as each offense involves an element of proof which the other does not. *Pereira* v. *United States,* 347 U.S. 1 (1954). So, in *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir., 1976), *Cert. denied,* 429 U.S. 824 (1976), the defendant was charged in the State of Nebraska under Nebraska law with robbery in that he took property from the victim by force or by putting the victim into a state of fear. He was separately charged under Nebraska law with the offense of use of a firearm during the course of a felony. In fact, the means used to put the victim in a state of fear in the robbery was the use of the gun which served as the basis of the charge of using a firearm in the commission of a felony. Considering the *Blockburger* test, that is, whether the offenses are the same or whether each requires proof which the other does not, the court determined that the two Nebraska charges were not the same offense because the proof required by statute to establish one was not the same as the proof required by statute to establish the other. Proof of the robbery did not necessarily involve the use of a firearm, nor did the elements of robbery enter of necessity into the statutory definition of use of a firearm during the course of a felony. The test is what elements of proof are required under the applicable statute, not the particular proofs in a particular case. *Virgin Islands* v. *Smith,* 358 F.2d 691 (3rd Cir., 1977). The fact that in a particular case the proofs might be virtually the same is not a relevant consideration. This was the precise point made by Mr. Justice Underwood in his dissenting opinion below when he stated: "The crucial evidence is not that actually presented, but the evidence required by the applicable statutes". (Petition for Certiorari, P.A. 12.) See, *Gavieres* v. *United States, supra.*

Clearly here, as we shall see in examining the definitions of the two offenses under Illinois law under the following point, the required proofs were not the same. Thus, there was nothing to be found in the provisions of the Fifth Amendment which would have prevented the charges of involuntary manslaughter lodged against John Vitale from having been prosecuted to a proper conclusion.

II.

THE TRAFFIC OFFENSE CHARGED AGAINST JOHN VITALE WAS NOT A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER UNDER ILLINOIS LAW, THEREFORE THERE WAS NOT THE REQUISITE IDENTITY OF OFFENSES TO MAKE THEM THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES.

In its opinion below, the majority of the Illinois Supreme Court held that John Vitale was twice placed in jeopardy for the same offense because the traffic charge of failing to reduce speed to avoid an accident is a lesser included offense of the charge of involuntary manslaughter. This result, as stated in the dissenting opinion of Justices Underwood and Ryan, is simply not correct. It is true that conviction of a greater offense will preclude subsequent conviction of any of its lesser included offenses, and that conviction of any of those lesser offenses precludes subsequent conviction of the greater offense. *Harris* v. *Oklahoma,* 433 U.S. 682 (1977); *Brown* v. *Ohio,* 432 U.S. 161 (1977). In *Brown, supra.,* the offense of joyriding was found under Ohio law to constitute a lesser included offense of theft of an automobile; therefore, defendant could not be tried and/or convicted of both those offenses. In *Brown,* this Court specified the issue in the case as; "Whether the double jeopardy clause of the Fifth Amendment bars prosecution and punishment for the

crime of stealing an automobile following a prosecution and punishment for the lesser included offense of operating the same vehicle without the owner's consent". (432 U.S. at 162.) The fact that in *Brown* we were dealing with an instance involving greater and lesser included offenses was taken as settled by this Court in its determination of that case. But in order to have the situation of a lesser included offense, it is necessary that proof of the greater offense will always, of necessity, include proof of the lesser. *Brown* v. *Ohio, supra., Virgin Islands* v. *Acquino,* 278 F. 2d 540 (3rd Cir., 1967). Put another way, the lesser offense requires no proof which is not necessary in order to prove the greater, and the greater offense includes among its necessitated proofs all of the elements of the lesser included offense. Thus, as determined by this Court in the *Brown* decision, the lesser included offense is the same offense as the greater for purposes of the concept of double jeopardy.

In the present case, the fact that the traffic offense of failure to reduce speed to avoid an accident is not a lesser included offense of the felony charge of involuntary manslaughter may be clearly seen from the two Illinois statutes involved. Involuntary Manslaughter is defined by statute in Illinois as follows (Ill. Rev. Stat. 1973, Ch. 38, Sec. 9-3):

> "(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.
> "(b) If the acts which cause death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide".

Thus, the Illinois State Legislature has specifically made reckless homicide a lesser included offense of the crime of involuntary manslaughter. It seems clear from this that the

Illinois law makers intended this lesser offense to be available as an alternative for conviction in a case involving the death of some person due to the driving of an automobile by the accused charged with involuntary manslaughter. Although taking the time to specify reckless homicide as an included offense of involuntary manslaughter when the death results from the driving of a motor vehicle, the Illinois law makers made no similar provision concerning the traffic offense of failing to reduce speed to avoid an accident. The reason for this is that clearly that traffic offense is in no sense a lesser included offense of involuntary manslaughter.

The traffic charge is defined under Illinois law as follows (Ill.Rev.Stat., 1973, Ch. 95½, Sec. 11.601(a):

> "No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions or the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding highway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care."

Speaking for himself and for Mr. Justice Ryan in his dissenting opinion in the Illinois Supreme Court below, Mr. Justice Underwood after analysing these provisions concluded (Petition for Certiorari. P. A10):

> ". . . Clearly, proof that one failed to reduce the speed of his vehicle to avoid a collision (the traffic offense) does not prove manslaughter, for the traffic offense need not involve death; equally clear is the fact that commission of the crime

of involuntary manslaughter (the wardship charge) need not involve an unlawful failure to reduce speed or even the use of a car."

The fact that in this particular instance death of the children resulted, among other factors, from Vitale's failure to reduce the excessive speed of his vehicle, is not relevent. Under the "same evidence" test the criterion is not that which was proven in the particular case, but rather that which must be proven to meet the requirements of the several statutory provisions involved. If the so-called greater offense can be proven without of necessity including the lesser, or if the lesser includes an element not necessarily to be found in the so-called greater, then they are not of necessity included offenses and are not the same offense for purposes of the protection offered by the Fifth Amendment. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Virgin Islands* v. *Smith,* 558 F.2d 691 (3rd Cir., 1977); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir., 1976), *Cert. denied,* 429 U.S. 844 (1976); *People* v. *Hairston,* 46 Ill.2d 348, 263 N.E.2d 840 (1970), *Cert. denied,* 402 U.S. 972 (1971). It is obvious here that failure to reduce speed need involve no death nor even collision with a pedestrian, while involuntary manslaughter need involve no use of an automobile or element of speed at all. The offense of involuntary manslaughter must, by definition, involve the death of some person, an element completely lacking from the definition of the traffic offense of failure to reduce speed to avoid an accident. Thus, under no circumstances can it be said that these two offenses are necessarily included one within the other. They are not included offenses. They are not, therefore, the same offense for purposes of double jeopardy.

The Supreme Court of the State of Ohio in a case not unlike that now before us held that a conviction for homicide by vehicle did not preclude conviction on a traffic charge of driving at a speed greater than will allow the driver to be able to stop within an assured clear distance. *State* v. *Best,* 42 Ohio. St. 2d 530, 536, 330 N.E. 2d 421 (1975):

> "The only common element to the two offenses is that both involve the operation of a motor vehicle. No element of speed or distance ahead is involved in the offense of homicide by vehicle, and no element of causing death . . . is involved in the offense of failing to keep an assured clear distance. Although both offenses arose out of the same transaction, they are separate and distinct offenses."

Here also, the statutory elements of the two offenses are different and it is this which makes them separate and distinct offenses for double jeopardy purposes. *Virgin Islands* v. *Smith,* 558 F.2d 691 (3rd Cir., 1977); *United States* v. *Cumberbatch,* 563 F.2d 49 (2nd Cir., 1977). There is, as we have noted, no constitutional prohibition either in Federal or Illinois law against multiple prosecutions when an act or series of acts results in separate and distinct violations of the law. *United States* v. *Crew,* 538 F.2d 575 (4th Cir., 1975), *Cert. denied,* 429 U.S. 852 (1976), *People* v. *King,* 66 Ill.2d 551, 362 N.E.2d 352 (1977).

We submit, therefore, that it is clear that the traffic offense of which John Vitale was found guilty was not a lesser included offense of involuntary manslaughter, nor are the two offenses the same offense in law and in fact. They are not the same offense for purposes of double jeopardy. Therefore, the opinion of the majority of the Suppeme Court of Illinois was incorrect and should not be allowed to stand as the law in the State of Illinois. On the contrary, this Honorable Court should set aside the determination of the Illinois Supreme Court below and thus set right the concept of double jeopardy as applied to cases such as the one now before us.

CONCLUSION

For the reasons set forth above, the People of the State of Illinois respectfully request that this Honorable Court reverse the judgment of the Supreme Court of Illinois herein reviewed and remand the case to that court with directions to return it to the Circuit Court of Cook County for further, proper proceedings on the charges of involuntary manslaughter.

Respectfully submitted,

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FOR ARGUMENT

No. 78-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ILLINOIS,

Petitioner

vs.

JOHN M. VITALE,

Respondent

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF AND ARGUMENT FOR RESPONDENT

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BRIEF AND ARGUMENT FOR RESPONDENT

Pursuant to the mandate of this Court, the Illinois Supreme Court on March 22, 1979, certified that its judgment as expressed in its opinion in this cause was based upon federal constitutional grounds. Pursuant to this Court's order of October 1, 1979, granting the Writ of Certiorari in this case, your Respondent, John M. Vitale respectfully requests that this Honorable Court affirm the decision of the Supreme Court of Illinois which was rendered on April 3, 1978.

STATEMENT OF THE CASE

The statement of the case presented to this Court by the State is incorrect, if not deceptive. The State's brief relies entirely on the dissenting opinion of Mr. Justice Underwood of the Illinois Supreme Court. Mr. Justice Underwood's dissent rests primarily on a police report that was never offered, let alone admitted, into evidence in this cause (A-21—A-26). How this police report ever became a part of the official record in this case is a mystery. Nevertheless, the State and Mr. Justice Underwood use it as a factual basis for rationalizing their legal conclusions. It is highly prejudicial to John Vitale as it goes to the merits of the case which, to date, have never been an issue in the matter now before this Court. However, the State and Mr. Justice Underwood would have this Court believe that this police report should be considered and accepted as admitted evidence.

To allow or accept any reference to a police report that emerges out of nowhere and appears in the official court record is to ignore the most basic rules of evidence, not to mention the concept of fundamental fairness. The mere fact that Mr. Justice Underwood refers to and relies on this police report in justifying his dissent indicates that he has formed an opinion on the merits of the case. In fact, Mr. Justice Underwood suggests that he has a preconceived opinion about this case when he states, ... "but the difficulty of an absolute rule is amply demonstrated by the majority holding here which permits a defendant who has *caused* two deaths to escape punishment other than a nominal fine." (Petition for Certiorari, P. A-22). Mr. Justice Underwood, on the basis of a police report not in evidence and, in any event, inadmissible, has concluded guilt of involuntary manslaughter on the part of John Vitale.

The police report and any reference to it in any part of the State's brief must be totally rejected. To do otherwise would create a wholly new appealable issue. The People and Mr.

Justice Underwood should have known better but, in any event, it renders their respective positions tainted and untenable.

In all other respects, the State's statement of the case seems accurate.

ARGUMENT

AFTER HAVING BEEN TRIED AND CONVICTED IN A STATE COURT FOR THE OFFENSE OF FAILURE TO REDUCE SPEED TO AVOID AN ACCIDENT, THE DOUBLE JEOPARDY CLAUSE PRECLUDED JOHN VITALE FROM BEING SUBSEQUENTLY AND FURTHER PROSECUTED ON CHARGES OF INVOLUNTARY MANSLAUGHTER.

I

THE TRAFFIC OFFENSE OF FAILURE TO REDUCE SPEED AND THE OFFENSE OF INVOLUNTARY MANSLAUGHTER WERE THE SAME OFFENSE UNDER THE DOUBLE JEOPARDY CLAUSE AND SHOULD HAVE BEEN PROSECUTED IN A SINGLE PROCEEDING. RESPONDENT'S RIGHT TO BE FREE FROM AN IMPROPER SECOND JEOPARDY FOR THE SAME OFFENSE WAS VIOLATED WHEN HE WAS CHARGED WITH INVOLUNTARY MANSLAUGHTER THE DAY AFTER HIS TRIAL AND CONVICTION ON THE TRAFFIC CHARGE.

While operating his automobile, John Vitale struck two children, one of whom died immediately and the other the following day. As a result of this single act, John Vitale was first charged with failing to reduce speed to avoid an accident and, the day after he had been tried and convicted on this traffic charge, he was charged with two counts of involuntary manslaughter in a juvenile petition. The majority of the Illinois

Supreme Court held that the two offenses, failure to reduce speed to avoid an accident and involuntary manslaughter, were the same offense for double jeopardy purposes and, therefore, the conviction on the traffic charge of failure to reduce speed precluded the prosecution in a separate action for involuntary manslaughter.

In this case, it is conceded that all offenses arose from a single act, i.e. the accident which resulted in the deaths of the two children. There could have been no offense of failure to reduce speed to avoid an accident without the accident, and there could have been no manslaughter offense without the same accident resulting in death. Nevertheless, the People maintain that whatever offenses may have arisen from that single act, they, the People, are entitled to prosecute any such offenses in as many separate and successive prosecutions as they see fit, for the reason that each such offense may contain an element or elements different from the others. This is exactly the kind of situation that is forbidden by the Fifth Amendment guarantee against double jeopardy which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U.S. 784 (1969).

In its opinion, the majority of the Supreme Court of Illinois determined that the two separate statutory offenses of failing to reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the "same" within the double jeopardy clause. They relied upon *Brown* v. *Ohio,* 432 U.S. 161 (1977), where this Court stated:

> "It has long been held that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition."

The Illinois Supreme Court obviously agreed with the Illinois Appellate Court's conclusion that the acts in both the failure to reduce speed and the involuntary manslaughter offenses were

identical, with the exception that in the manslaughter offense a death was involved. However, the Illinois Supreme Court went beyond the compulsory joinder statutes to hold that both offenses were the same offense under the Double Jeopardy Clause, a reason they felt was even more compelling why John Vitale could not be subsequently prosecuted for the offense of involuntary manslaughter.

II

THE TRAFFIC OFFENSE FOR WHICH JOHN VITALE WAS TRIED AND CONVICTED WAS A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER AND, FOR PURPOSES OF DOUBLE JEOPARDY, CONVICTION OF THE LESSER INCLUDED OFFENSE PRECLUDES PROSECUTION OF THE GREATER, JUST AS CONVICTION OF THE GREATER OFFENSE PRECLUDES PROSECUTION OF THE LESSER OFFENSE.

In its opinion, the Illinois Supreme Court examined the statutory definition of the crimes of involuntary manslaughter and failure to reduce speed and decided that failure to reduce speed was a lesser included offense of involuntary manslaughter. In their construction of these two statutes, the Illinois Supreme Court made, for purposes of this case, the offenses of failure to reduce speed and involuntary manslaughter the same offense. The Ohio courts "have the final authority to interpret. . . that State's legislation." *Brown* v. *Ohio,* 432 U.S. 161 (1977), citing *Garner* v. *Louisiana,* 368 U.S. 157 (1961). So, also, has the Illinois Supreme Court here interpreted its statutes and has determined that in this particular case the offense of failure to reduce speed is a lesser included offense of involuntary manslaughter. They have "authoritatively defined the elements" of the two Illinois statutes. *Brown* v. *Ohio,* 432 U.S. 161 (1977).

The People argue that Vitale was charged with separate, statutory crimes that were not identical in elements or in proof. What the People really are saying is that because they simply erred in not prosecuting all charges arising out of Vitale's accident in a single proceeding, they should be allowed a chance to redeem themselves by trying to extract a greater penalty out of Vitale. But this is precisely what the constitutional guarantee forbids. *Ashe* v. *Swenson,* 397 U.S. 426 (1970). Although no transcript of John Vitale's first trial was made, it is undisputed that he appeared in court, pleaded not guilty and after a full trial in which witnesses and evidence were presented against him, the trial court found him guilty of failure to reduce speed. In fact, John Vitale testified on direct and cross examination. If the State were allowed to re-try Vitale on the subsequent manslaughter charges, they would be relitigating the same, identical issues and facts that were brought out in the first trial on the traffic offense. It would be a mere reiteration of testimony. At best, they might be able to establish the greater offense of involuntary manslaughter but, in so doing, they would necessarily have to establish the lesser included offense of failure to reduce speed. Any lesser offense is included in the greater offense for the purpose of double jeopardy. *In Re Nielsen,* 141 (U.S. 176 (1889)).

Whatever logic there is to the People's argument justifying a separate and subsequent trial for manslaughter disappears when this case is viewed from a different perspective. If, for example, John Vitale had first been tried and convicted or acquitted of involuntary manslaughter, would anyone suggest that he could thereafter be prosecuted by the State in a separate proceeding at a subsequent date on the traffic charge? Speaking for the majority of the Illinois Supreme Court, the late Mr. Justice Dooley said, "The sequence of the prosecution is immaterial. The conviction of the lesser precludes conviction of the greater, just as conviction of the greater precludes conviction of the lesser. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *In Re Nielsen,* 131 U.S. 176 (1889). It is irrelevant of what offense,

failing to reduce speed or involuntary manslaughter, Respondent was first convicted." (Petition for Certiorari A-8) In *Harris* v. *Oklahoma,* 433 U.S. 682 (1977), the defendant was convicted of felony murder in state court arising out of an armed robbery; he was subsequently convicted of the lesser offense of robbery with firearms in District Court. This Court held that the Double Jeopardy Clause barred prosecution of the lesser crime after conviction of the greater one. This Court stated that "... a person who has been tried and convicted for a crime which has various incidents included in it, ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Harris,* supra.

No matter how the State tries to manipulate this case, it would be impossible for them to ever prove the greater offense, involuntary manslaughter, without *a fortiori* proving the lesser included offense of failure to reduce speed to avoid an accident. As Mr. Justice Dooley stated in speaking for the majority of the Illinois Supreme Court: (Petition for Certiorari A-8)

> "As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the "same" as the lesser included offense within it."

If the State's position were to be adopted, they would be able to take Vitale's single act and turn it into any number of separate, statutory offenses which they could prosecute separately in successive prosecutions. What would bar them from filing charges and demanding separate trials for such offenses as failure to reduce speed to avoid an accident, driving too fast for conditions, reckless driving, reckless conduct, ignoring a crossing guard, reckless homicide, involuntary manslaughter and a host of similar offenses? Obviously, they would not be permitted to take such a single act and divide it into so many separate

statutory offenses, and this very point was clarified by this Court in *Brown* v. *Ohio*, 432 U.S. 161 (1977), where, in reversing Brown's second conviction, the Court said:

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Applying this test to the instant case, clearly there was but one act which resulted in various charges being placed against John Vitale. Moreover, there was no time sequence between the traffic charge and the manslaughter charges such as existed in *Brown* v. *Ohio*, 432 U.S. 161 (1977). In *Brown*, Mr. Justice Blackmun, in his dissent, acknowledged that there could be a situation involving a time span that could cause him to agree with the holding in that case when he said:

> "It is possible, of course, that at some point the two acts would be so closely connected *in time* that the Double Jeopardy Clause would require treating them as one offense."

Both offenses here were the same and they could not be fragmented so as to create different offenses. The State, in attempting to place John Vitale on trial twice for the same offense, was properly barred by the constitutional prohibition of double jeopardy from imposing more than one punishment for the same offense. *Brown* v. *Ohio*, 432 U.S. 161 (1977).

CONCLUSION

For the reasons set forth above, the respondent, John Vitale, respectfully requests that this Honorable Court affirm the judgment of the Supreme Court of Illinois herein reviewed.

Respectfully submitted,

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FOR ARGUMENT

No. 78-1845

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REPLY BRIEF AND ARGUMENT FOR PETITIONER

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REPLY BRIEF AND ARGUMENT FOR PETITIONER

Pursuant to the order of this Court entered on October 1, 1979 granting the Writ of Certiorari in the instant case, your Petitioner, the People of the State of Illinois, timely filed the brief and argument for Petitioner. Respondent John Vitale, has now filed a brief contesting the position taken by your Petitioner. Therefore, the People of the State of Illinois herewith submit brief reply to the Respondent.

STATEMENT OF THE CASE

At pages four through seven of the People's brief your Petitioner sought to give a brief summary of the case beginning with the incident in which two young children were struck and killed by the automobile of John Vitale, and indicating the course of the case until its present setting for consideration by this Honorable Court. In so doing, the People included a one paragraph summary of a police report concerning the circumstances of the striking of the children; that report being part of the record in all Illinois courts of review below. It appears that, for the first time, Respondent now takes exception to the presence of this report and to any mention of it by the People of the State of Illinois. We feel compelled to say here that the extended references in Respondent's brief to alleged bad faith or prejudicial conduct on the part of the People are out of place in this Court, and that even more out of place are the comments in the same section relating to alleged predisposition to decide the case on the part of the Honorable Robert Underwood, Justice of the Supreme Court of the State of Illinois.

Be that as it may, the facts in this case remain as set forth in the People's brief. John Vitale drove his automobile into an intersection where he struck and killed two children. He was ticketed by an officer at the scene for failing to reduce speed to avoid an accident and was convicted and fined on the basis of that traffic citation. The proceeding brought against him for two charges of involuntary manslaughter arising out of the deaths of the children was dismissed on double jeopardy grounds and that dismissal was eventually affirmed by the Supreme Court of the State of Illinois. Therefore, following certification by the Illinois court that its decision was based upon an interpretation of the Constitution of the United States, the case has come before this Court for ultimate determination on the Writ of Certiorari.

ARGUMENT

I.

THE TWO OFFENSES HERE WERE NOT THE SAME OFFENSE FOR PURPOSES OF THE DOUBLE JEOPERDY CONCEPT EMBODIED IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The issues in this case remain as stated in the People's initial brief: (1) were the two offenses here under consideration the "same" offense for double jeoperdy purposes, and (2) is failing to reduce speed to avoid an accident a lesser included offense of involuntary manslaughter as those offenses are defined under Illinois law?

As to the first of these, it is clear that offenses are seperate and distinct and not the same for double jeoperdy purposes when each involves an element of proof which the other does not. *Jeffers* v. *United States,* 432 U.S. 137 (1977); *Blockburger* v. *United States,* 284 U.S. 299 (1934). This is the concept known commonly as the "same evidence test". See *Ashe* v. *Swenson,* 397 U.S. 436, 463 (1969). The question is not as to the elements of proof in the particular case, but rather the elements required by the individual statutes involved. *Brown* v. *Ohio,* 432 U.S. 161 (1977). Contrary to the position taken in the brief for Respondent, there is no prohibition against trial and/or punishment for more than one offense arising out of a single act or series of acts as long as the offenses are seperate and distinct and not the same offense for purposes of double jeoperdy. *Pereira* v. *United States,* 347 U.S. 1 (1954); *Gavieres* v. *United States,* 220 U.S. 338 (1911).

This Court has held to these same principles in its action of November 13, 1979, in dismissing for want of a substantial federal question case No. 79-5506, *Brintley* v. *Michigan,* ____ U.S.____, 26 Cr.L. 4113. The question presented there was

whether Michigan statutory provisions making separate offenses out of the action of committing a particular felony and committing that same felony while armed offended double jeoperdy. Once more this Court held that the test is that set forth in *Blockburger* v. *United States,* 284 U.S. 299 (1934); that test being whether the offenses are the "same offense". This Court again finds that nothing prevents legislatures of the individual States from enacting such legislation as long as each offense involves proof which the other does not. Certainly the conduct of using a firearm to commit a felony involves the same act or series of acts. Clearly, however, this does not preclude separate prosecutions under the concept of double jeoperdy.

As pointed out by the court in *Virgin Islands* v. *Smith,* 558 F.2d 691 (3rd Cir. 1977), not only may statutes enumerate different elements thus showing that more than one offense arises from particular conduct, but the nature of those elements may indicate that the legislature intended the offenses to be seperate and distinct. Here, a reading of the two Illinois statutes involved, setting forth the elements of the crime of involuntary manslaughter and the traffic offense of failing to reduce speed to avoid an accident, shows that they do not of necessity involve the same elements and that the legislature never contemplated them as the same offense. Failure to reduce speed does not involve any element of death or even of striking any person, while involuntary manslaughter of necessity involves a death but involves no element concerning the operation of a motor vehicle. (See, Petitioner's Brief, Pp. 17-18).

Cases such as *Benton* v. *Maryland,* 395 U.S. 784 (1969), cited by Respondent, are not here in point. The question there concerned whether the defendant could be convicted at a second trial of an offense for which he had been acquitted at a first trial, when the case was overturned on review due to the holding that Maryland's system of jury selection was Constitutionally improper. That such a conviction would be

forbidden by the concept of double jeoperdy, has no relivence to the present question before this Court.

Therefore, once more we urge this Court that these offenses are not the same offense for double jeoperdy purposes.

II.

THE TRAFFIC OFFENSE IS NOT A LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER UNDER ILLINOIS LAW AND THUS NOT THE SAME OFFENSE FOR DOUBLE JEOPERDY PURPOSES.

The Illinois Supreme Court's majority below held that the traffic offense of failing to reduce speed to avoid an accident is a lesser included offense of involuntary manslaughter. Mr. Justice Underwood and Mr. Justice Ryan strongly dissented pointing out that this could not be the case considering the statutory elements of the two offenses involved. The People have argued at length in their initial brief that the traffic offense is not a lesser included offense of involuntary manslaughter as those offenses are defined in Illinois. (Petitioner's Brief, PP. 15-19) Once more we note the traditional test which is that in order to constitute a lesser included offense situation, it must be true of necessity that one cannot prove the so-called greater offense without also proving the lesser. *Brown* v. *Ohio,* 432 U.S. 161 (1977); *Virgin Islands* v. *Acquino,* 278 F.2d 540 (3rd Cir., 1967). Under this test it is clear that proof of the offense of involuntary manslaughter may easily be made without reference to an automobile at all. Moreover, even proof of that offense involving the operation of an automobile may well have no element of failing to reduce speed contained within it. Similarly, the offense which is characterized as a lesser included offense, failing to reduce speed, involves no element of death or even necessarily of collision. We submit that had the legislature of Illinois intended such a traffic charge to be a lesser included offense, they would have so indicated by the elements of the

offense as set out in the statute. On the contrary here, however, the elements indicate that seperate offenses were conceived and defined by the legislators. Therefore, the dissenting opinion of the Supreme Court below is the correct interpretation and should be adopted by this Court.

The Respondent contends that this Court is bound by the majority opinion of the Illinois Supreme Court below and may not consider the question of lesser included offenses. Were this true, the rule in *Brown* v. *Ohio,* 432 U.S. 161 (1977) would govern here. However, in *Brown* the concept of joyriding as a lesser included offense of automobile theft under Ohio law came to this Court undisputed. Here there is a dispute in the highest court of Illinois as to whether the traffic offense is a lesser included offense. The question comes before this Court in a different posture than it did in *Brown,* and in order to determine whether double jeoperdy forbids the second prosecution in the instant case it is necessary that this Court resolve the issue concerning whether the traffic offense is a lesser included offense of involuntary manslaughter. The quote from *Brown* v. *Ohio* at page five of Respondent's brief is out of context and does not indicate that the Supreme Court of the United States is bound here by the pronouncment of the majority of the Illinois Supreme Court below.

It should be noted that it is not clear that the proofs would be the same in a trial for involuntary manslaughter as they were in the trial of the traffic case. In fact, we do not know what proofs were presented in the traffic case. The assertions made in the brief for the Respondent that John Vitale testified and was subject to cross-examination, or as to what proofs may have been presented, is completely beyond the record before this Court. (Respondent's Brief, P. 6) However, even though decrying the mention of the police report herein, Respondent seems to concede in its brief that numerous incidents were here involved concerning multiple driving violations on the part of John Vitale. (Respondent's Brief, P. 7)

Be that as it may, we are not here concerned with what the People below might have done or hypothetical questions as to how many traffic violations Vitale might have been charged with. We are concerned here with one question; whether it is a violation of the concept of double jeoperdy as set out in Amendment V of the Constitution of the United States to try Vitale for involuntary manslaughter in the deaths of the children although he paid his traffic fine for failing to reduce speed to avoid an accident. We submit that the answer to this question is that no violation of the United States Constitution is involved and, therefore, the case should be remanded following the overturning of the result reached in the Illinois courts below.

CONCLUSION

For the reasons set forth above, the People of the State of Illinois respectfully request that this Honorable Court reverse the judgment of the Supreme Court of Illinois herein reviewed and remand the case to that court with directions to return it to the Circuit Court of Cook County for further, proper proceedings on the charges of involuntary manslaughter.

Respectfully submitted,

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